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*** *Symbol *** in the margin of the index denotes* ***'most important'*** *Short note.*

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1. INTRODUCTION, DEFINITION, NATURE,SCOPE AND SIGNIFICANCE OF LEGAL THEORY

(MOST IMPORTANT)

SYNOPSIS:

A. *Introduction*

B. *Evolution of Jurisprudence*

C. *Definition of Jurisprudence*

D. *Types of Jurisprudence*

E. *Nature of Jurisprudence*

F. *Jurisprudence and its relation with other subjects*

G. *Purposes and objectives of Jurisprudence*

H. *Advantages / Value of the study of Jurisprudence*

I. *Magna Carta*

J. *Conclusion*

A. INTRODUCTION:

Jurisprudence (Legal theory) means "Knowledge or Science of Law". It attempts to explain the nature of law and its interactions with the life of the community. In the life of the community, the relationship of man with properties, with other men, etc, are involved.

Thus every system of law has got certain basic concepts like property, ownership rights, punishments, liability, etc., Jurisprudence tries to explore and explain such basic concepts of law.

B. EVOLUTION OF JURISPRUDENCE:

Jurisprudence is not a creation but a growth over centuries. It is an evolution by steady and silent development by millions of people over a period of time.

The evolution of Jurisprudence may be studied under **three** periods namely:

1. Pre - Roman Period
2. Roman Period
3. Post Roman Period

In the ancient **Pre-Roman Period,** Jurisprudence was practically ignored. Coherent and systematic science of legal relations was absent. Sir Henry Maine States that no durable legal system existed in this period.

Only during **Roman Period,** the beginning of legal science started. The term "Jurisprudence" is of Roman origin signifying "knowledge of law". The Romans were the first to study legal science as a distinct branch of learning.

During the **Post Roman Period,** Jurisprudence again lost its independent nature and became a branch of **Theology** (study of Religion). Only during the 19th century, it again started gaining momentum and independence.

C. DEFINITION OF JURISPRUDENCE:

1. AUSTIN:

Austin defines Jurisprudence as the philosophy of positive law (Juspositivum). It means - the law pronounced by the political Sovereign for controlling the human conduct.

2. Salmond:

Salmond defines Jurisprudence as the science of first principles of civil law. It means that Jurisprudence deals specifically with the principles of Civil Law only. (Civil law means rules applied by Courts in the administration of justice).

Jurisprudence, thus, is different from theology and ethics, which deal with the religious laws to regulate human conduct. The judicial laws regulate the external human conduct whereas theology and ethics regulate the inner moral beliefs by fear of divine sanction.

3. Sir Holland:

Sir Holland defines Jurisprudence as 'the formal science of positive law". The formal science deals with the fundamental principles underlying the positive legal concepts like property, contract, possession, ownership, negligence, etc.

4. Gray:

Gray defines Jurisprudence as "the Science of law, dealing with the Statement and systematic arrangement of the rules followed by the Courts and the Principles involved in those rules".

5. Clark:

Clark defines Jurisprudence as "the science of law in general".

6. BEALE:

Beale terms Jurisprudence as "the Science of Justice".

7. ULPIAN:

Ulpian is a Roman Jurist. He defines jurisprudence as the knowledge of things relating to **human beings and the divine power**. It is also the science of **the just and the unjust**.

The Ulpian definition of jurisprudence thus covers religion (knowledge of divinity), ethics (knowledge of human conduct) and philosophy (science of just and unjust).

Ulpian definition jurisprudence is based on the law prevailed in the beginning of Roman civilization. Further his definition is similar to the term of 'Dharma' of Hindu religion, which preaches religion, ethics and philosophy as basis of law. Dharma prescribes rules for human conduct for attaining material and spirutual salvation of human kind.

Dharma is applicable to all people irrespective of castes, status, etc., It is equally applicable to the King and the common man.

8. PATON:

Jurisprudence is a particular method of study not of the law of one country, but of the general notions of the law itself.

All the above eight definitions of jurisprudence **emphasises two things**:

i. It is a Science of Law.

ii. It is not the study of law itself, but of its underlying basic concepts.

D. TYPES / BRANCHES OF JURISPRUDENCE:

Jurisprudence is divided into **three** types/branches

1. General Jurisprudence:

It deals with the fundamental concepts of law, common to all legal systems. The term "Jurisprudence" is used to denote only general Jurisprudence. E.g., Basic concepts like property, possession, etc.

2. Particular Jurisprudence:

It deals with the special features of a particular legal system. For e.g., Ancient Hindu Legal System, American Legal System, etc.

Difference between Particular and General Jurisprudence:

Austin says that **Particular Jurisprudence** is the science of any actual system of law. It is the study of practical Jurisprudence in particular. In other words, particular Jurisprudence is the science of any **one of the system of law**.

General or universal Jurisprudence is a description of subjects and laws common to all systems and resemblances between different legal systems.

General Jurisprudence is the science concerned with the exposition of the principles, notions and distinctions which are common to the system of law.

According to **Salmond**, the above division is an unnatural division. General Jurisprudence is not the study of legal system in general, but the study of the fundamental elements of a particular legal system.

Holland says - Particular Jurisprudence is a system of generalisation extending over a limited area, but holds good everywhere. The term particular Jurisprudence is not correct. Both the general and particular Jurisprudence are expressions of one and the same. They represent science of the basic principles of law.

3. Comparative Jurisprudence:

Comparative Jurisprudence is the study of similarities and differences existing in basic legal concepts in different legal systems. It is not an expert branch of Jurisprudence but a comparative study of systems in all its branches in two or more legal systems.

For e.g. Comparison of Ancient Roman law with Ancient Hindu Law, Comparison of American Legal system with Indian Legal system, etc.

E. NATURE OF JURISPRUDENCE:

Paton comments - 'the great modern controversy has concerned the boundaries of jurisprudence and the methods it should employ". He says so, because the nature of jurisprudence or its methods of application cannot be confined to fixed boundaries.

Thus regarding the nature of Jurisprudence, at present there are **three** different opinions. Majority of jurists call Jurisprudence as a **Social Science**. Some other jurists call it a **Formal Science**.

1. JURISPRUDENCE - A SOCIAL SCIENCE:

Social Science is the study of human activities from the social and spiritual point of view. Thus Social Science is different from Natural Science in that the latter deals with human biology or physiology, while the former deals with the moral and social activities of human being.

Jurisprudence is classified as a branch of social science attempting to explore and explain the social and moral rules of human conduct.

Sociology, ethics, theology, psychology and economics are also concerned with the man - as a social being and as such related to Jurisprudence as part of Social Science.

2. JURISPRUDENCE - A FORMAL SCIENCE:

Sir Holland calls Jurisprudence as the formal science of positive law. It is a formal or analytical study of law.

A formal science is a science dealing with the fundamental principles underlying certain concrete details. It is different from material science in that the material science deals with the concrete details only, while the formal science deals with the basic principles underlying such details.

Jurisprudence is a formal science because it deals with the underlying purposes and principles of certain general basic details like property, ownership, possession, title, liability etc., common to all material legal systems. Sir Holland calls Jurisprudence as a formal science of relation of mankind with those which are generally recognised as having legal consequences.

Sir Salmond calls it as the science of first principles of the civil law meaning that it concerns with general civil concepts like Property, Contract, Possession, Ownership etc., and thus constitutes the basis of a developed civil legal system.

F. JURISPRUDENCE AND ITS RELATION WITH OTHER SUBJECTS:

1. DEFINITIONS OF JURISPRUDENCE:

The **Roman Jurist Ulpian** defined Jurisprudence as the knowledge of things **divine and human,** the science of the **just and unjust.**

Julius Stone describes Jurisprudence as the lawyer's extra version. It is the lawyer's examination of the concepts, ideals and techniques of the law in the

light derived from present knowledge in disciplines other than the Law.

According to Austin, the science of Jurisprudence is concerned with positive law. Austin divided the subject into general and particular Jurisprudence.

Sir Thomas Erskine Holland defined, "Jurisprudence as the formal science of positive law."

John Salmond defined, "Jurisprudence as the Science of Law".

G.W. Paton defined, "Jurisprudence is a particular method of study, not of law of one country, but of the general notion of itself."

2. Relations of jurisprudence with other social sciences:

Different branches of knowledge (Subjects) are so inter-related to jurisprudence.

According to **Paton**, "Modern Jurisprudence crosses into the fields of social sciences and of philosophy; it digs into the historical past and attempts to create the symmetry of a garden out of the luxuriant chaos of conflicting legal systems".

Roscoe Pound of the Harvard Law School, explained, "Jurisprudence, ethics, economics, polities and sociology are distinct enough at the core, but shade out into each other."

a) Relation between Jurisprudence and Sociology:

Sociological Jurisprudence is based on Sociological theories. It is essentially concerned with the **influence of law on society at large**, particularly social welfare.

For eg.,

i. In the case of crime (a subject of jurisprudence) in society, its causes are to a very great extent **sociological** and to understand their pros and cons, one must have **knowledge of society.**

ii. Sociology has helped jurisprudence in its approach to the problem of **prison reforms** and has suggested ways and means of **preventing social wrongs**.

iii. Behind all legal aspects, there is something social. The causes of crimes are partly sociological and an understanding of sociology helps the legislators to make prison reforms and prevention of crimes.

iv. Motives, aims and theories of punishment and the efficacy of the various types of punishments are helped by sociology.

v. The study of sociology has given a new orientation to the study of Jurisprudence.

vi. In the sociology of law, the emphasis is on **society** but in sociological Jurisprudence emphasis is on the **relation between law and society.**

vii. The sociology of law is a branch of sociology dealing with the **law and legal institutions in the light of sociological principles, aims and methods.**

b) Relation between Jurisprudence and Psychology

i. Psychology is defined as the **science of mind and behavior**. Human science can be better discussed properly only with a thorough knowledge of the human mind and hence it is closely connected with jurisprudence.

ii. In the study of criminal jurisprudence, there is a great scope for the study of psychological principles in order to understand the criminal mind behind the crime.

iii. Both psychology and jurisprudence are interested in solving such questions as the **motive for crime, a criminal personality,** whether a criminal gets **pleasure in committing a crime,** why there are **more crimes in one society** than in another and **what punishment should be given** in any particular case.

iv. In criminology, psychology plays an important part. It is the duty of a lawyer to understand the criminal and the working of a criminal mind.

v. Jurisprudence is concerned with man's external conduct and not his thoughts and mental processes, but penology has benefited from the knowledge made available by psychological researchers.

a) Relation between Jurisprudence and Ethics:

i. Ethics is defined as the **science of human conduct**. It deals **how man behaves** and what should be the **ideal human behaviour**. There is the **ideal moral code and the positive moral code.**

ii. Ethics is concerned with **good or proper human conduct** in the light of public opinion. Public opinion varies from the place to place, from time to time and from people to people.

iii. Jurisprudence is related to **positive morality** in so far as law is considered as the instrument through which positive ethics ties to assert itself. Positive morality is not dependent upon the good actions of a good man only. It requires a **strong coercive influence** for maintaining public conscience.

iv. The branches of ethical jurisprudence tries to examine the existing ethical opinions and standards of conduct in terms of law. It makes suggestions for necessary changes so that it can properly depict the public conscience.

v. There are many **ethical rules of conduct which are not considered** as crimes. The law ignores trifles. It may be immoral to tell a lie but it is not a crime. Many acts are unethical but all unethical acts are not necessarily criminal.

One has to consider the problem of laws which are considered undesirable by society. All that is prohibited by law is not necessarily immoral.

For enforcing certain ethical conduct, ethics depends upon law through police, law courts, judges and the system of courts and punishment.

vi. Legislation must be based on ethical principles. It must not be divorced from human values. No law can be good if it is not based on sound ethical principles. Ethics lays down the rules for human conduct based upon higher and nobler values of life.

b) Relation between Jurisprudence and Economics

i. Economics studies **man's efforts in satisfying his wants and producing and distributing wealth.**

ii. Economics is the **science of wealth** and Jurisprudence is the **science of law.** There is a close relationship between the two. Very often, **economic factors are responsible for crimes**. Economic problems arise from day to day and it is the duty of the law - giver to tackle those problems.

iii. The aim of the economist is to **improve the standard of life of the people** and also to **develop their personality**. Jurisprudence teaches legislators how to **make laws which will promote social and economic welfare.**

iv. Both jurisprudence and economics aim at the **betterment of the lives of the people.** There are laws relating to workmen's compensation, factory legislation, laws relating to labour, insurance, maternity welfare, bonus, leave facilities and other concessions given to workmen.

v. Both Jurisprudence and economics help each other in furthering the **welfare of society**.

c) Relation between Jurisprudence and History:

i. History studies **past events in their different perspectives**. The relation between Jurisprudence and history is so close that there is a **separate 'Historical School of Jurisprudence'**.

ii. History furnishes the back ground in which a correct idea of Jurisprudence can be realized.

d) Relation between Jurisprudence and Politics:

i. Jurisprudence is linked at one end with philosophy and at the other end with political theory.

ii. Politics deals with the principles governing governmental organization. In a politically organized society, there exist regulations which are called laws and they lay down authoritatively **what men may do and what they may not do.**

G. SCOPE, PURPOSES AND OBJECTIVES OF JURISPRUDENCE:

The following are the scope, purposes and objectives of Jurisprudence:

1. It is for the synthesis and developmental of the fundamental principles and conceptions of law.

2. Its objective is to give theoretical foundation for law.

3. It aims to universalise the common element existing in one legal system to all other legal systems.

4. It attempts at providing definitions for many legal terms which enable lawyers and jurists to have clear understanding of the concepts. It acts like a grammar to a particular language.

5. By providing definitions and explanations to many basic legal concepts, it aims to help lawyers to make correct usage of legal terms in their pleadings and similarly the legislators for enacting legally correct legislations.

6. It aims to make a lawyer efficient by educating him in legal concepts.

7. By crystallizing moral ideas, it is of assistance for progressive societies.

8. Jurisprudence constructs and elucidates concepts to make them more rational and thus help to improve their practice.

9. Jurisprudence also has educational value. The legal concepts sharpens the lawyer's logic.

10. The study of jurisprudence changes the static and formal approach of lawyers, as the concepts in jurisprudence are changed according to the needs and scientific advances of the society.

11. Jurisprudence teaches lawyers to look and search in all sides including the present social needs to find answers to new legal problems.

H. ADVANTAGES /VALUE OF THE STUDY OF JURISPRUDENCE:

1. By study of Jurisprudence, a person knows the basis of law. He gains knowledge of the basic ideas and the fundamental principles of law. Study of jurisprudence also helps a lawyer to solve new and difficult legal problems.

   For e.g., the knowledge of rules constituting possession would help a lawyer to find out who is the actual possessor of a property etc.

2. Jurisprudence also helps the Court in interpreting the true meaning of legislations, customs, etc.

3. It also helps the student community to understand the civil life of the society so that they could adjust themselves in the society without causing trouble to their fellow citizens.

4. The study of Jurisprudence also helps to suggest changes for the betterment of the existing laws.

5. By virtue of the definitions in Jurisprudence, the legislators need not define expressions like right, duty, negligence, etc, in every context.

I. MAGNA CARTA

Magna Carta is called **"the Great Charter".** It is a charter agreed by King John of England in1215 to make peace between the unpopular King (King John) and a group of rebel barons.

It promised the protection of church rights, protection for the barons from illegal imprisonment, access to swift justice, and limitations on feudal payments to the Crown.

However, both the parties to the agreement did not conform to their promises.

After king John's death, his son Henry III, reissued the document at the end of the Barons' war in 1217. It formed part of the peace treaty and the document acquired the name Magna Carta.

This Magna Carta was reissued in 1225 and in 1297, the Magna Carta was confirmed as part of England's statute law. After the Magna Carta, the English Parliament passed new laws and hence the Magna Carta lost some of its practical significance.

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In 1628, the Magna Carta was given a statutory status by the Parliament by including many more rights to the subjects and it was named as **'Petition of Rights'.** The Petition of Rights recognized Parliamentary superiority over the Crown as regards the rights of the subjects were concerned.

The Petition of Rights became **'Bill of Rights'** in the year 1689. It gave the Parliament not only superiority over the Crown but also documentary authority as regards the rights of the subjects were concerned.

The Magna Carta influenced the formation of the American Constitution in 1789, which became the supreme law of the land in the Republic of the United States.

Magna Carta still forms an important symbol of liberty today and is held in great respect by the British and its colonies and also the American legal communities.

As per Magna Carta, monarchs should rule in accordance with the custom and the law and respect the rights of the subjects.

J. CONCLUSION:

Jurisprudence thus introduces **reasoning** to the study of law and it sets the goal of law for an ideal order in which justice, social, economic and political is assured to all the people in the State.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *"Jurisprudence is the science of the first principles of the civil law" - Salmond. Elaborate.*
2. *Define Jurisprudence and discuss the nature and types of Jurisprudence.*
3. *'Jurisprudence is the scientific synthesis of the essential principles of law' – C.K. Allen. Comment.*
4. *"Jurisprudence is a social science" - Comment.*
5. *Explain a few definitions of Jurisprudence.*
6. *'Jurisprudence is the study of fundamental legal concepts'. In what way, it is different from the study of other legal subjects.*
7. *'The great modern controversy has concerned the boundaries of jurisprudence and the methods it should employ" – Paton – Explain.*

2. AUSTIN'S DEFINITION OF LAW

(THEORY OF SOVEREIGNTY OR IMPERATIVE THEORY OR SANCTION THEORY OR COMMAND THEORY)

(MOST IMPORTANT)

SYNOPSIS:

- ***A. Definition***
- ***B. Ingredients***
  - ***a. Command***
    - *i. Particular*
    - *ii. General*
  - ***b. Sovereign***
    - *i. Definition*
    - *ii. Characteristics*
    - *iii. Theory of Sovereignty*
    - *iv. Criticism*
  - ***c. Sanction***
- ***C. Criticism of Austin's theory***
- ***D. Conclusion***

A. DEFINITION:

Austin defines law as 'the command of the Sovereign issued to his subjects to follow a particular course of conduct, failing which they will be faced with evil consequences namely punishment'.

So, according to Austin, the commands of the Sovereign are laws to the people and the administrative

authorities have to implement them. The people have to obey such laws. If they fail to obey, they will be punished.

B. INGREDIENTS:

Austin's definition has **three** important ingredients:

i) Command ii) Sovereign iii) Punishment or Sanction

I. COMMAND:

A command is the expression of wish or desire to another to do or not to do a particular act. It comes with an intimidation that if the other person does not obey the command, he will be punished. So a command is different from **wish or desire**, where there is no intimidation or punishment.

The capacity to direct another person to do or not to do an act is called the **Right of the person**. The obligation to obey the command on the intimidation of punishment for disobedience is called the **Duty of the person**. The evil of punishment is called the **Sanction**. Thus, Right, Duty and Sanction are correlated to one another.

Commands are divided into **two** types. They are:

i. Particular Command:

It enjoins or forbids a **particular act** specifically mentioned.

ii. General Command:

It enjoins or forbids a **class or series of acts** forming a course of conduct.

The commands coming from all persons are not Law. Only the command that comes from the mouth of the Sovereign or the Supreme power is law. Even in the case of the Sovereign, all words that come from his mouth are not law. Only when the Sovereign thinks that he is going to pronounce a law, the words that come from the mouth of the Sovereign at that time constitute a command.

II. SOVEREIGN:

i. Definition:

The Sovereign is a supreme person or a body of persons in an independent political society. Sir Austin defines "Sovereign" as 'a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society; that determinate superior is the Sovereign in that society'.

ii. Characteristics:

1. The Sovereign is not subordinate to any other foreign Sovereign.
2. He must receive habitual obedience and the obedience should not be occasional or temporary.
3. He must be common to the entire society.
4. One society cannot have two Sovereigns.
5. The Sovereign must preside over a political society.

6. The Sovereign must be a human being.
7. The presence of some rebels in the society will not affect the position or powers of Sovereign.
8. The Sovereign must have the power to command. So, command implies the power to compel obedience.

Austin defines **Superiority** as "the power of affecting others with evil or pain and of forcing them through fear of that evil, to fashion their conduct according to one's wishes".

9. The Sovereign of a political society enjoys positive superiority, unlike God who is natural superior to all. So, the laws enacted by the political Sovereign are called **Positive Laws**.

iii. Theory of Sovereignty:

According to Austin, the following are the principles of Sovereignty:

1. Sovereignty is **essential** in every State. It means in the absence of Sovereignty, there cannot be any political society in existence.

2. The Sovereignty is legally **unlimited** in power. The Sovereign power is absolute, illimitable and infinite in nature. Since he is supreme and his powers cannot be limited by any person.

3. The Sovereignty is **indivisible.** A country cannot have two Sovereigns. People cannot also obey tw

Sovereigns at a time. So the totality of the powers must reside with one Sovereign.

However, the powers of the Sovereign can reside with a body of persons.

4. The Sovereign power is **determinate.** It means the power of the Sovereign to receive obedience from the majority of the members of the society.

iv. Criticism:

Sir Salmond criticises Austin's Theory of Sovereignty as follows:

1. Salmond observes that it is not essential that the entire Sovereignty must be in a State. There can be semi Sovereigns or Sovereignty of a State is divided between State Government and Central Government.

2. Salmond does not agree with Austin's view that Sovereignty is indivisible. According to Salmond, the powers of the State may be carried out by **three** wings namely the **Legislature** to enact laws, the **Executive** to enforce the laws and the **Judiciary** to interpret the laws correctly and administer justice.

So, Sovereignty can be shared between Union and States and within each sphere among Legislature, Executive and Judiciary. For e.g., the Indian Federation follows this principle.

3. Austin's theory that the powers of the Sovereign are unlimited and illimitable is also subject to criticism. Generally, the powers of the Sovereign are defined and limited.

For e.g., both in the Constitution of India and U.S.A., the powers of the Federal legislature and the State legislatures are defined and there cannot be interference in the powers of one another.

Moreover, Sovereignty depends on the degree of obedience of the subjects to the commands of the Sovereign and as such, the subjects will revolt against unreasonable commands and the Sovereign will fail, if the majority of the subjects disobey the commands of the Sovereign.

So the modern theory of Sovereignty is that the Sovereign power is not the legislature or any individual, but the subjects themselves. If the Sovereign acts against the people's will, he is bound to fall.

Thus the word 'Sovereign' in the modern political society is difficult to define. However it comprises both the Rulers and the Ruled and the Sovereignty is diffused throughout the society with more powers apparently to certain persons. Such persons are called the "Sovereign in a relative sense".

III. SANCTION:

The evil of punishment which would be the consequence of disobeying the command is called sanction. It may be a pain or want of pleasure.

According to Austin, Sanction is the power and purpose of inflicting an evil in case of disobedience of command. In certain cases, the sanction will be such that the transaction in violation of law is treated as nullity in a Court of law. Austin includes nullity also in sanction.

For e.g. non registration of a sale deed may result in the loss of the properties. Locke and Bentham include rewards also as sanctions. Rewards may be for compliance of a command.

However Austin does not agree with this view. His criticisms are as follows:

1. A reward can be only an inducement and it cannot act against an unwilling person.

2. A reward defeats the purpose of command.

3. Law does not cringe for favours by offering reward, etc., but it is a command compelling obedience.

C. CRITICISM OF AUSTIN'S THEORY:

1. Austin says that the command should be followed by punishment or by sanction. But, in the present legal set up, punishment is not always given for the disobeyal of commands.

For e.g., Civil Laws do not prescribe any punishment. The punishment or sanction for disobedience may be true in a Monarchical Police

State but not in a Welfare State. Law is obeyed because of its acceptance by the community.

2. Austin says that law is established only by the command of the Sovereign and hence according to Austin, legislation is the only source of law. This is incorrect, because Customs and Precedents are also sources of law.

   Austin says that a judge is merely the minister of Sovereign and thus his judgements are in fact commands of the Sovereign only.

   Similarly, according to Austin, no custom can be regarded as law unless it is approved by the Courts. The Sovereign can also abolish a custom by a law.

   Austin, however could not give a convincing explanation to customs and precedents which are totally independent sources of law.

3. Austin's definition of law fails ethically also. It does not link law with justice, but links law with command and sanction. Thus his definition does not deal with the purpose and object of law.

4. Sir Henry Maine criticises Austin's theory of Law from the historical point of view. In ancient States, Sovereigns were concerned with the administration of State only and not with the formulation of laws.

   Only custom and usages were the laws of the society. Thus there were no laws by the commands of Sovereign.

5. According to Austin's definition of law, Constitutional Law cannot be considered as a law, because Constitutional law lays down restrictions on the powers of the Sovereign himself. But Constitutional Law is regarded as one of the most important laws in modern days.

6. Austin's definition of law fails to explain the personal Laws like Hindu Law, Mohammedan Law, etc. These laws came into existence even before the formation of Governments and Sovereign powers. These laws are recognised as valid laws.

7. Under Austin's definition of law, International Law cannot be considered as a law, as it is not the creation by Sovereign Power.

   The force and power of International law is by the mutual consent of the States and there is no imperative authority to any one State to make it obey the International Law. All modern jurists regard and recognise International law as an important law.

8. Austin's definition of law has failed to include the Courts, which administer the law. The Courts administer the laws, irrespective of whether the people know law or ignorant of them.

   So laws concern the Court first and then only the people. Austin has completely ignored such an important institution namely the Court in his definition of law.

9. Salmond criticises Austin's definition of law as it refers only to 'a law' (Statutes) and not 'the law' (common legal principles).

Austin's definition thus cannot explain the common principles of law generated from all sources like legislation, custom, precedent, etc., but only the statutory law namely the legislation.

10. According to Austin, there can be no law, if there is no coercive administration of justice through punishment by the State.

This is incorrect because every legal principle does not assume the form of a command. There are well developed bodies of law which contains many principles which are outside the scope of command.

For e.g., in law of contracts, damage is caused by competition in trade, but for this, there is no cause of action.

Similarly, legal principles like res judicata, interpretation of legal terms in written documents and other Court procedures are outside the scope of the Austin's imperative theory.

D. CONCLUSION:

Even the best definition of Austin does not hold good to explain the various principles and problems of law. Inspite of its being subject to many criticisms, it stands as the best definition of law till today.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *State the salient features of positive law with reference to Austinian theory of law. How do commands differ from requests and wishes?*
2. *State the elements of the Imperative theory of Law. Do you agree with the theory?*
3. *Analyse Austin's concept of law.*
4. *Evaluate the theory that law is only the product of a Sovereign's command.*
5. *Explain the "theory of Sovereignty" by Austin and the criticisms against it.*
6. *What are the criticisms against the Austin's definition of law?*
7. *Explain Austin's definition of law. Give the criticism levelled against it.*

3. SALMOND'S/GRAY'S DEFINITION OF LAW

(LAW AS A PRACTICE OF COURT/LEGAL REALISM)

(JUDGE MADE LAW)

(IMPORTANT)

SYNOPSIS:

A. Introduction

B. Explanation

C. Merits of Salmond's/Gray's Definition

D. Criticism

a. Vinogradoff's Criticism

b. Prof. LLewellyn's Criticism

c. Paton's Criticism

d. General Criticism

E. Salmond's answer to the criticism

F. Conclusion

A. INTRODUCTION:

Salmond defines Law as 'the body of principles recognised and applied by the State in the administration of justice'. In other words, law is the rules recognised and acted on by Courts of Justice.

Prof. Gray (U.S.A.) defines "the Law of the State or of any organised body of men is composed of the rules which the Courts lay down for the determination of legal rights and duties".

A close scrutiny of both the definitions of Sir Salmond and Prof. Gray would reveal that both the definitions have the same meaning.

B. EXPLANATION:

Laws may be made by legislation or by popular custom, but such legislation or custom gains legal character only when they are recognised and applied by the Judge of the Court in the administration of justice.

So, according to Sir Salmond and Prof. Gray, it is the Court which gives binding effect to any Act of the legislature or the custom or any other source of law. If the Courts reject a custom or declare an Act of legislature as void, then it has no binding effect at all.

Similarly, any interpretation given to any word or words of Act of Legislature would have binding effect. So, both Salmond and Gray conclude that the true test of law is the enforceability by the Courts of law.

C. MERITS OF SALMOND'S/GRAY'S DEFINITION:

1. This definition of law brings out the ethical purpose of law. Law is only an instrument of justice and this is clearly brought out in Salmond's/Gray's definition of law.

2. Whatever be the source of law, it gets binding effect only after its recognitions by a Court of law. Salmond's idea of judicial theory is not a ***'law in the concrete sense of enacted law' but the law of 'law sensu***

abstractu' (abstract sense) which creates every rule of law, from whatever source it may arise. Thus Salmond has defined law in the abstract sense that whatever be the sources of law, only if it is recognised by Court it becomes law.

3. Salmond's/Gray's definition of law is a practical definition as it refers to the Courts which recognise the laws.

D. CRITICISM: (Demerits of Salmond's Theory)

a. Vinogradoff's Criticism:

1. Judges simply apply law. So, Salmond's/Gray's definition does not directly define Law, but it says Law is what the Court recognises. It is just like defining a motor car, as 'a vehicle driven by a driver' and medicine as 'a drug prescribed by a doctor'.

   So Salmond does not define law but only defines the medium namely the Court through which law is applied.

2. According to Salmond, law is formed subsequent to administration of justice but in general practice, Courts only apply and enforce law which is already enacted by State to render justice.

b. Prof. LLewellyn's Criticism:

He observes that Salmond's definition of law is incorrect. All laws are not administered by Courts.

For e.g., Taxation Laws, Revenue Laws, etc., are administered by Tribunals. According to Salmond, only principles administered by Courts are laws.

So taxation and revenue laws are not laws according to Salmond, but these Statutes are recognised as laws.

c. Paton's Criticism:

In modern days, there exist a number of Statutes and Laws. Many laws do not come before the Courts at all. Still they are recognised as Laws.

For e.g., Administrative Law. The executive is the final authority in rendering justice by applying the rules of Administrative laws. Administrative law is recognised as law though it does not come before any judicial authority.

d. General Criticism:

1. The term "administration of justice" generally means the application of law to particular facts of a case.

   So, to define law in terms of administration of justice and to define administration of justice in terms of law will only lead to confusion and a circle of arguments. So, Salmond's definition of law is vague.

2. According to Salmond, only precedents can become law. But in practice, legislations and customs are also sources of law.

For e.g., Hindu Law is the outcome of custom only.

3. In modern days, many Constitutions provide for the over ruling of the judgements of the Courts by subsequent legislations. They also take away the jurisdiction of Courts totally with regard to certain legislations.

For e.g., Maintenance of Internal Security Act during emergency period in India.

4. **Judges do not make law:** The judges are mere applicators of law. They have no power to invent new law and they have to apply the law as it is even if it causes miscarriage of justice.

If the legislation/statute is ambiguous and not comprehensive enough, even then the Judges have no discretion except to apply the legislation as it is and decide the cases.

It means the power of the judiciary is only to apply law and decide cases. If the Judges exceed the limit and start enacting laws, then the society will empower the parliament to take away this power of the Judges.

E. SALMOND'S ANSWER TO THE CRITICISM:

1. The final authority to validate or to invalidate a principle or a rule is only the Courts and Judicial Bodies. Many legislations passed by the Parliament are struck down as ultra vires by the Courts.

Similarly many customs are invalidated by Courts. Thus statutes and customs cannot become laws, if Courts refuse to accept them.

But it is the Court's judgements and findings which become the binding laws to the people. Thus, the definition of Salmond is practical with regard to recognition of law by Courts.

2. According to Salmond, law - as defined in Jurisprudence - denotes rules to render justice. So, the laws administered by Authorities other than Courts (Administrative Tribunals) are not Laws in the strict sense.

They are influenced more by expediency and by political considerations than by strict justice. So, law in Jurisprudence should be defined only in terms of Courts. So, Administrative Law, Taxation laws and Revenue Laws are not laws in the strict sense.

F. CONCLUSION:

Salmond has defined law with reference to its source and origin. He lays importance to the Courts instead of the Sovereign or the Legislatures.

In Salmond's definition, "Law means the opinions of half a dozen old gentlemen from the highest Court of a Country".

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What are the salient features of Salmond's theory of Law?*

2. *"Law is a body of rules recognised and enforced by the Courts" - Salmond. Comment.*

3. *Discuss what, in Salmond's view, are the functions and purposes of Law.*

4. *Explain Gray's definition of law.*

5. *"There is no such thing as judge made law as the judges do not make law - Critically examine this statement.*

6. *Write short notes on: (a) Law as practice of Courts (b) Functions and purposes of law*

4. KELSEN'S PURE THEORY OF LAW OR GRUND NORM (PRIMARY NORM)THEORY

(MOST IMPORTANT)

SYNOPSIS:

- ***A. Introduction***
- ***B. Pure Theory of Law or Grund Norm***
- ***C. Necessity of Grund Norm***
- ***D. Advantages of Kelsen's Pure Law***
- ***E. Criticism***
- ***F. Conclusion***

A. INTRODUCTION:

The Author of Pure theory of law is Sir Kelsen. When he was Professor of law at the University of Vienna, he formulated the Pure theory of law. This is an improvement of Austin's Command Theory.

B. PURE THEORY OF LAW OR GRUND NORM:

Science is divided into Normative Science and Natural Science.

In Normative science, there is no casual connection or sequence. For e.g., if there is A, then there is no B, but B must be there.

In Natural science, there is casual connection or sequence of cause and effect. For e.g., if there is A, then there is B.

According to Kelsen, Law is only a normative science and not a natural science. Law is the systematic character of a legal system consisting of rules (norms). All these rules (norms) arise from the same basic rule/ rules called grundnorm.

Grundnorm is a hypothetic, fundamental norm. It is purely imaginary and hypothetical and cannot have sequence of cause and effect as required by natural law.

For example, in English law, the Grund Norm is "Whatever the King lays down in Parliament is law". On this assumption, the entire legal system exists.

Similarly, if there is a written constitution, then the grundnorm is that the constitution must be obeyed. If there is no written constitution, then the social behaviour is the grundnorm.

For e.g., the English legal system is based on parliamentary legislations and judicial precedents. Here the grundnorm is parliamentary legislations and judicial precedents.

C. NECESSITY OF GRUND NORM:

The necessity of grund norm can be explained historically.

1. Who can have the law making power in the State was decided by giving the grund norm to such person.

For e.g., in Monarchy, the King had the power to make law. In Democracy, peoples' representatives have the power of making laws.

2. While giving the grund norm to such person, it is necessary to lay down the procedure for making the grund norm. In other words, how the grund norm of law making power should be proceduralised must be given.

Delegated Legislation:

The grund norm of highest authority was devolved to lower ranks by a system called delegation of law making powers.

Thus every law making power of lower authorities can be traced to grund norm of highest authority. The entire law making organs and their processes are knows as the legal order of a particular State.

D. ADVANTAGES OF KELSEN'S PURE LAW:

1. Kelsen's pure law is applicable to all legal systems.

2. It is an improvement of Austin's theory.

3. Kelsen's theory could explain the presence of Constitutional law.

4. According to Kelsen, law need not only be Command.

5. Similarly, according to Kelsen, there is no distinction between private law and public law.

6. As per Kelsen's theory, international law is a law.

7. As per Kelsen's theory, customs, legislations and precedents are all sources of law.

8. As per Kelsen's theory, Law and State are similar; State is only the outcome of legal order. So State and Law are the same.

E. CRITICISM:

1. **Lauterpacht** criticises Kelsen's theory, as a back door entry of Natural Law through the medium of grund norm.

2. **Allen** criticises Kelsen's theory as custom, legislation and precedents are different, co-ordinate and parallel sources and not in the hierarchy as suggested by Kelsen.

3. **Friedmann** criticises Kelsen's theory as inadequate as it does not explain the effect of economics, psychology and sociology on law.

F. CONCLUSION:

The main weakness of Kelsen's theory is the grund norm which is based on unproved hypothesis.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Critically examine the Kelsen's theory of pure law.*

2. *Explain Grund Norm as formulated by Kelsen.*

3. *What is a Grund Norm? What is its place in Kelsen's framework about law?*

4. *"Whatever way the effectiveness measured, Kelsen's theory has ceased to be 'Pure', for the effectiveness of Grund-Norm would seem to depend on those very sociological factors which he so vehemently excluded from his theory of law"- Comment.*

5. *What are the salient features of the Pure Theory of Law?*

5. HART'S DEFINITION OF LAW

(LAW AS A SYSTEM OF PRIMARY AND SECONDARY RULES)(UNION OF RULES)

SYNOPSIS:

A. *Introduction*
B. *Characteristics of legal rules*
C. *Hart's Definition*
D. *Gunman law*
E. *Hart's criticism of Austin's theory of law*
F. *Comparison between Primary rules and Secondary rules*
G. *Hart's criticism of Kelsen's pure theory*
H. *Advantages of Hart's definition of Law*
I. *Criticism of Hart's definition of Law*

A. INTRODUCTION:

According to professor H.L.A. Hart, many laws do not have sanctions attached to them E.g.: Customary laws, Enabling laws etc.

B. CHARACTERISTICS OF LEGAL RULES:

Law is a body of rules (Legal rules) recognised and maintained by the State to regulate the human behavior and conduct in a society.

Legal rules have the following characteristics.

1) It is a set of rules
2) Legal rules are rules of conduct

3) It regulates the human conduct

4) Legal rules are concerned with the external conduct of individuals.

5) It is created and maintained by the State.

6) It has certain amount of stability, fixity and uniformity.

7) It is backed by coercive authority.

8) Its violation leads to punishment.

9) It is the expression of the will of the people and is generally written down to give it definiteness.

10) It is related to the concept of 'sovereignty' which is the most important element of state.

11) Legal rules are supposed to reflect the society's traditions, values , and religious beliefs; therefore, social and legal rules differ from time to time and from place to another.

12) Legal rules are supposed to develop with the development of the society they regulate.

13) Legal rules must not be specific to particular persons or specific acts of particular persons.

14) Legal rules must be open, and clear.

15) One cannot be guided by a retroactive legal rules, or rules that are not published.

16) Legal rules must be accompanied by sanction.

C. HART'S DEFINITION:

Hart defines laws by **two** types of rules - **primary** and **secondary rules**.

The **primary rules** lay down standards of behaviour and are rules of obligation imposing duties.

The **secondary rules** are ancillary to the primary rules in various ways, i.e., the ways in which primary rules may be ascertained, introduced, eliminated or varied or conclusively determined. The secondary rules are procedural and remedial, i.e., rules of judicial procedure and evidence.

It is the union of primary and secondary rules which constitute the legal system.

Law further depends on the external social pressures as not to deviate from the rules and the inner point of view that human beings conceive as imposing an obligation.

For a legal system to exist, there must be general obedience by the citizens to the primary rules of obligation, but it would not be necessary for the citizens to possess an internal point of view of these rules and it is a necessary condition for the existence of a legal system.

D. GUNMAN LAW:

H.L.A Hart was dissatisfied with **John Austin's "Command Theory",** because according to Austin, law is a command backed by threat.

Hart compared Austin's theory to the role of a **gunman** in a **bank** and tries to establish the differences between the gunman's orders and those made by law.

The gunman forces us to obey, but we may not feel inclined to obey him. similarly, obedience to the law comes with a threat of punishment.

Thus Hart critiqued Austin in what he called the **"gunman situation writ large"** i.e., if a gunman comes to you, giving the option between your money or life, he achieves what he wants by threatening to take away your life, which is not juxtaposed to what Austin alleged through his command theory.

The difference between gunman's threat and the law by sovereign are as follows-

1. The gunman's threat is temporary, whereas the sovereigns is eternal.

2. The gunman targets the individual; the sovereign generally society.

3. The gunman's control is physical and whence this comes from fear of the gun, the sovereigns power comes from a cerebral control.

E. HART'S CRITICISM OF AUSTIN'S THEORY OF LAW:

1. In terms of content of law, not all laws are imperative or **coercive**. Some are facilitative, allowing us to create **contracts** and other legal relations.

2. Austin believed that every legal system had to have a **sovereign** who creates the law (origin), similar to the bank scene's gunman, who is the only source of commands and who is not subject to other's commands.

3. Hart argues that this is an inaccurate description of law, noting that laws may have several sources and all laws are not coercive. The laws enacted by legislators control the legislators themselves, unlike, as per Austin, the king is above law. they create.

4. There is no psychological reasoning in the Austin's theory;

5. The threat of punishment is imminent under Austin's even if it cannot be sufficiently carried out.

6. Command and duty are indeed one term: all of which Hart rightfully negates.

7. Threats which are backed by intimidation do not necessarily equate to obligations under law; rather, they only give reason why people comply.

8. Austin only looks at the mere substance of peoples fear

9. Austin negates to look at a persons attitude, beliefs and drives.

10. Austin has no interest in self-actualization in terms of assessing personal conduct.

11. Austin was blinded by his love of science, instead of trying to delve into the real issues of what constitutes law. He tried to solve the innate issues from his limited standpoint.

F. COMPARISON BETWEEN PRIMARY RULES AND SECONDARY RULES:

1. The primary rules lay down the standards of behaviour of duties, while the secondary rules relate to the identification, creation, change and application of the powers.

2. The Primary rules simply impose duties, wheras the secondary rules are power conferring rules, i.e., power to make and unmake other rules in the system called rules of recognition. The secondary rules prescribe the methods and procedures for creating, annulling and altering rules of law.

G. HART'S CRITICISM OF KELSEN'S PURE THEORY:

Hart refuses to regard the grundnorm as a hypotheses. According to him, it is a rule accepted and observed in the society. A customary rule by acceptance and observance becomes a social practice and also the general rule of the society. In England, the customary rules followed in practice became the parliamentary laws.

H. ADVANTAGES OF HART'S DEFINITION OF LAW:

Hart's analysis of the concept of law represents sociological school of law. Hart does not define the meaning of law, but only describes a working model of a standard legal system.

Social behaviour and social institutions help the sociologist to provide basic secondary rules which is the basis for the unifying force for a legal system.

I. CRITICISM OF HART'S DEFINITION OF LAW:

1. Hart has omitted to take the other fundamental principles like acts or omissions which one can reasonably foresee that they would likely to injure others.

   These are not social practices to constitute secondary rules, but still such acts/omissions amount to civil wrongs for which there should be a law i.e., Law of torts which according to Hart cannot be a law.

2. Only well developed laws like English Law, French law, etc., may obey the conditions of Hart's definition of law. International law is not a developed law and hence it lacks the basic rules of Hart's definition. So according to Hart - International law is not a law, but in practice, it is considered as a law.

3. Hart's definition is silent about the extent to which the secondary rules must enjoy the acceptance of the society.

According to Hart, for a rule to exist, there must be more than a mere social practice and behaviour and there should not be a deviation. They should be accepted as rules by the officials to apply in the administration of law.

4. The social practice and social behaviour creates only moral 'ought', but not legal 'ought'. Different 'oughts' including moral 'ought' serves as secondary rules to be the basis for primary rule.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Critically examine Prof. H.L.A. Hart's concept of law as a system of rules?*
2. *Explain how Prof. Hart's concept of law is different from Kelsen's pure theory of law.*
3. *Explain Hart's primary rule and secondary rule theory constituting law.*
4. *Write short note on: Hart's definition of law.*

6. REALIST THEORY - C.W. HOLMES, LLEWELLYN

(IMPORTANT)

SYNOPSIS:

A. Introduction

B. C.W. Holmes' approach

C. Llewellyn's approach

D. Perome Frank's approach

E. Realist approach and traditional definition of law - Comparison

F. Criticism

G. Conclusion

A. INTRODUCTION:

The Realist Movement is of recent origin and its Principal Home is the United States of America. The American Legal Thought is therefore termed as Realist Approach of Law. The Swedish Jurists have also contributed considerably to the Realist Approach of Law.

Sir Oliver Wendell Holmes is regarded as the Father of the Realist approach.

B. C.W.HOLMES' APPROACH:

Holmes defines law as the prophecies of what the Courts will do in fact. Thus law is what Courts or its Judges do and not what they merely say. Until a Court

passes a judgement on certain facts, there is no law existing on the subject. The opinion of lawyers is only a guess of what the Courts will decide.

Thus law is defined in terms of official action of the Court. So any force which will influence the judge in reaching a decision is a material point of law. The force may be on bad lines also like bias, corruption, partiality towards sex, etc.

C. LLEWELLYN'S APPROACH:

Prof. Llewellyn, one of the American exponents of the Realist Movement putsforth the following features of Realist approach' of law.

1. Law is 'doing something' about disputes, the doing of it reasonably.

2. The people who have ' the doing' in charge, whether they be Judges or Sheriffs or Clerks or Jailors or Lawyers are officials of the law.

3. What these officials do about disputes is the law itself.

4. Law is regarded as dynamic and not as static.

5. Law is regarded as serving certain social ends.

6. Judges have greater freedom of choice in arriving at decisions and so the study of the individual

personality of the judges is important to procast accurately the most probable decision by them in the given circumstances of a case.

7. The proper functioning of a legal system must accept a divorce of 'is' from 'ought'.

D. PEROME FRANK'S APPROACH:

Frank, in his book titled "law and the modern mind" states as follows:

The certainty of law is a basic legal myth. Law would never exist as a full and perfect body of rules and principles. The aim of judgement involves search for the appropriate principles and application to the facts of the case. A matured mind must welcome constant changes in the society as well as in the law.

E. REALIST APPROACH AND TRADITIONAL DEFINITION OF LAW - COMPARISON:

According to traditional definition, Law is a body of rules and principles which are enforced by the Courts.

According to Realists, this is an outdated definition and it has to change with time and therefore, they call it as ***'prophecies of what Courts will do in fact'***.

The Realist definition is now wide as to include other social factors like money, power, caste, partiality to sex, corruption etc., besides the body of rules and principles.

F. CRITICISM:

1. The realists deny the importance of legal rules and principles which is incorrect. If unconnected, isolated decisions are to be law, then even past decisions cannot be law and there will never be a law to follow.

2. A mere judgement without reasons would never be a basis for legislative action but it is a value based judgement only.

G. CONCLUSION:

Inspite of the above criticisms, realist approach is very useful to the science of law, as it always attempts to determine a desirable law for the society.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *"For the realist, the Sovereign is the Court" - Explain with reference to the Realist approach to law.*
2. *Law is regarded by "Realists" as emanating from Judges - Comment.*
3. *Discuss law as the practice or product of Courts.*

7. ALLEN'S THEORY OF LAW

SHORT NOTE

According to Allen, the law of the modern civilized world is enforced by some sanction. So Austin is correct that the sanctioning power is the source of authority of law.

Criticism:

Allen criticizes Austin's Imperative theory as follows:

It is very difficult to determine the juridical basis of systems of legislations and justice. In a democratic and federal pattern of Constitution, Austin's indivisible sovereignty is not applicable.

Even in England, a new conception of law is felt necessary with the changed conditions of the community. So in modern days, sanction cannot always be the source of law.

For e.g., civil law is the product of State and it is implemented through Judicial tribunals and not by executive sanctions.

8. UTILITARIANISM
(ETHICAL THEORY OF LAW)

SHORT NOTE

1. A utilitarian philosophy is used when making social, economic or political decisions for the "betterment of society". In utilitarianism, an action is considered to have utility only to the extent that it contributes to the overall good.

2. The philosophy of utilitarianism was first proposed and discussed by John Stuart Mill and Jeremy Bentham in the mid-1800s.

3. Utilitarianism is an **ethical philosophy** in which the happiness of the greatest number of people in the society is considered the greatest good.

4. According to this philosophy, an action is morally **right** if its consequences **lead** to happiness (absence of pain), and wrong if it ends in unhappiness (pain).

5. Under utilitarianism, since the **link** between actions and their happy or unhappy outcomes depends on the circumstances, no moral **principle** is absolute or necessary in itself.

6. Utilitarianism maximizes utility. It is maximizing happiness and reducing suffering. It is a theory in **normative ethics.** Bentham says that the value of a pleasure or pain, considered by itself, can be measured according to its intensity, duration, certainty/uncertainty and propinquity/remoteness.

7. According to utilitarianism, the moral worth of an action is determined only by its resulting outcome. In any Government, it is the greatest happiness of the greatest number of people which is the measure of right and wrong. This is described as a fundamental axiom.

8. Utilitarianism primarily focuses on acts and habits leading to happiness. It is considered to be the natural ethic of a democracy operating by simple majority without protection of individual rights, even though protecting individual rights would maximize happiness.

9. Utilitarianism is divided into Ideal Utilitarianism, Act and rule utilitarianism, Preference utilitarianism, Negative utilitarianism and Motive utilitarianism.

CLASSIFICATION OF SCHOOLS OF JURISPRUDENCE

Schools are classified into **eight** types based on the similar opinions of jurists regarding the nature and sources of law.

THE SCHOOLS ARE AS FOLLOWS:

1. NATURAL LAW SCHOOL OR REASON SCHOOL
2. ANALYTICAL SCHOOL OR POSITIVIST SCHOOL
3. HISTORICAL SCHOOL
4. SOCIOLOGICAL SCHOOL
5. PHILOSOPHICAL SCHOOL
6. NEO AUSTINIAN SCHOOL
7. ECONOMIC SCHOOL
8. REALIST SCHOOL

The important schools of thought, one by one, are discussed in the succeeding Chapters.

9. NATURAL LAW SCHOOL OR DICTATE OF REASON SCHOOL

(IMPORTANT)

SYNOPSIS:

A. Introduction

B. Origin and Development of Natural Law

1. *Natural Law in Ancient Greece*
2. *Natural Law in Rome (Jus Gentium)*
3. *Natural law during Medieval days*
4. *Natural Law during Middle Ages*
5. *Natural Law during Modern period*

C. Application of Natural Law

D. Conclusion

A. INTRODUCTION:

Natural Law is a law based on human reasoning. Augustine defines it as **'eternal law'** in the divine order or will of God which requires the preservation of natural order and forbids the breach of it. It is inherent in the nature of man and it enables the man to distinguish the good from evil and right from wrong.

B. ORIGIN AND DEVELOPMENT OF NATURAL LAW:

1. Natural Law in Ancient Greece:

The Natural law began in Greece about 2,500 years ago. There was **Homer's theory** in the 8th century B.C.

It said that the divinity of justice was with the King and there should be unquestionable obedience by the people. This did not satisfy the thinkers. It was **Haraculitus** who first turned to **Law of Nature** to find a **'standard justice'**.

The **Greek concept of Natural Law** explained that man, unlike animals, is endowed with reasoning power. This faculty of reasoning is part of nature.

Socrates, Plato and finally Aristotle named the law inspired by reason as 'natural law". The reasoning by the man at this State was found to be moral reasoning.

According to **Aristotle**, Natural Law consists of the following:

a. Natural law is inherent in the nature of men and it is called **human reasoning**.

b. The lacunae in law must be supplemented with equity depending on the circumstances of the case.

c. Natural Law binds both the People and the Government.

Thus, in ancient Greece, the Natural Law existed only as theoretical concepts but not put to practice.

2. Natural Law in Rome (Jus Gentium):

The Roman Natural law was known as **'Jus Gentium'**. As the Civil Law of Rome applied only to Roman

citizens, the Natural law namely Jus Gentium was applied to all Non-Romans. The Jus Gentium was a code of natural laws commonly observed by many Roman people. Slowly, the jus Gentium was also applied to make the Roman Law less rigid. The Roman's Jus Gentium could not be equated to Natural law, because Romans practised slavery which was against Natural Law.

3. Natural Law during medieval days:

During this period, Rome lost its supremacy and the Christian churches began to assert their religious dominance over the State. They considered that the Law of God was superior to King made law, and so, the church interfered and overrided the State laws. Slowly, both the State and Church invoked the Natural Law to support their assertions over each other.

4. Natural Law during middle ages:

i. 13th Century:

Towards the middle of 13th Century, **St. Thomas Aquinas** by his **Scholastic theory of Law** said that divine law is revealed in the inherent reasoning of man and is called the Natural Law. So long as the main laws were for common good of the society, they were in conformity with the Divine Law.

ii. 16th Century:

During the 16th Century, with the discovery of new Continents, commerce expanded and the commercial class of people wanted protection of their

increasing property interests. They all appealed to Natural Law in justification of their claims. Thus Natural law was no longer a Divine Law, but became the Law of Reason with the intellectual outlook.

iii. 17th Century:

In the 17th Century, **Hugo Grotius**, the Father of International Law framed a system of International law based on the Natural Law. According to him, 'the law of nations is the Law of Nature applied to international level'. In this connection, **Sir Henry Maine** observes, **'the greatest function of Natural law was discharged by giving birth to International law'**.

5. Natural Law during modern period:

i. 18th Century:

The Natural Law was also used against political tyranny in 18th century. In the **American war of Independence 1776** and **the French Revolution 1789**, the Natural law curtailed the unlimited power of the Government over people. This gave rise to the Natural law principle that social contract must be respected ***(pacta sunt servanda)***.

ii. 19th Century:

In the 19th century, the Natural law theory began to recede to the back ground due to the concepts of neutralism, scientific reasoning, sociological approach to human problems, etc.

Dictate of reason:

Natural Law is a law based on human reasoning. The Stoic philosophers viewed natural law as a manifestation of the Divine reason in man.

The law of nature is simply the dictate of common sense. It means the law of reason implanted by nature in the minds of human beings.

Sir Hume criticised Natural law which was based on 'human reasoning' as vague and uncertain. 'Reason', is often subject to passions, motives, etc., and as such, it could not be a guide to human actions.

According to him, on the other hand, moral senses based on acts which would give pleasure to others and uphold public interest must be the guide for human action and conduct.

The **"Parliament Supremacy"** gave a decisive blow to the Natural Law. The English Courts never allowed any principle of Natural law to question the validity of Legislative Statutes. The Natural law was applied only in cases where specific Act of Legislature was absent.

iii. 20th Century:

With the dawn of the 20th century, the Natural law once again got revived, since the legislative laws brought in stagnation in the legal system. The **'Nazi Statutory Laws'** in Germany during II World War failed to secure even the elementary justice to people and hence it was revolted by the people as violative of Natural law.

C. APPLICATION OF NATURAL LAW:

1. The doctrine of frustration of contracts, supervening impossibility of performance, quasi contracts, specific performance of contracts are all outcome of the Natural Law only.

2. The principles of 'Estoppel' (no one should deny what he has said or done) and 'holding out' in the law of Contracts, Transfer of properties, etc were evolved from Natural law.

3. The natural law has brought in a check in the whimsical action by the States and a control over administrative and quasi administrative functions of public authorities.

4. Natural law is also used to test the reasonableness of a custom and acceptability of foreign laws in municipal sphere.

5. The **five** cardinal principles of natural justice are as follows:

a. ***Audi Alterm partem*** (No man should be punished unheard).

b. ***Nemo debut esse judex non propria causa*** (No man can be a judge of his own cause).

c. **Bias** - pecuniary, personal and bias as to subject matter.

d. "He who hears the case must decide it".

e. "Justice must not merely be done, but must be done undoubtedly and manifestly".

f. **Lex Iniusta Non Est Lex** means an unjust law is no law at all, is a standard legal maxim. It originates with St. Augustine, and was used by St. Thomas Aquinas.

This view is strongly associated with natural law theorists, including John Finnis and Lon Fuller.

DICTATE OF REASON SCHOOL (JULIUS STONE):

Julius Stone (7 July 1907 – 1985) was Challis Professor of Jurisprudence and International Law at the University of Sydney.

He is the author of 27 books on jurisprudence and international law, after his name, Julius Stone Institute of Jurisprudence has been established which is as one of the premier legal theoretical schools. The Institute is designed to keep faith with Professor Stone's commitment to the importance of legal theory in its broad sense, which includes philosophical reflection, sociological theory and comparative enquiry.

Julius stone advocates dictate of right reason as the basis of law. The dictate of right reason points out that an act, as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity.

It includes doing good and not evil, Rules of universal obligation, Common sense, Basic morality, Ethic, Biological laws, etc., If dictate of right reason is

conformity with rational nature, then it becomes a law. If dictate of right reason is not conformity with rational nature, then it does not become a law. For example, law prohibits abortion slavery, genocide, war crimes etc., because such acts are not dictates of right reason. Similarly, all acts of grave depravity which are contrary to dictate of right reason are against law.

D. CONCLUSION:

Natural Law School has played an important role in the evolution of an ideal system of law. No doubt, it continues to command universal respect by its own interest and moral values.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Trace the origin and development of natural law.*
2. *What is the contribution of Natural Law to the modern Jurisprudence?*
3. *Trace the origin of Natural Law and point out its contribution to modern law.*
4. *What is Natural Law? How has it developed through the ages? What is the place of Natural law in the present century?*
5. *Explain the concept of Natural law pointing out its contribution to present day Jurisprudence.*
6. *Explain law as the dictate of reason. Estimate the contribution of the theory of law to modern Jurisprudence.*
7. *Elucidate the meaning of "Ethical thoughts" and "Legal thoughts" with reference to positive theories.*

10. ANALYTICAL SCHOOL
(POSITIVE SCHOOL OR TELEOLOGICAL SCHOOL OR IMPERATIVE SCHOOL OR AUSTINIAN SCHOOL) (BENTHAM SCHOOL)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Law as the Command of the Sovereign

C. Theory of Sovereignty

D. Criticism of Analytical School

E. Neo-Austinian School

A. INTRODUCTION:

Sir John Austin is considered to be the father of Analytical School. The other chief exponents of this school are **Bentham, William, Markby and Holland**.

According to this school, law is the command of the Sovereign. The approach of this school is that law must be studied as it is. The past or the future of law must not be looked into. That is why the school is called **"Positive School"**.

It proceeds logically to analyse the basic concepts of developed legal system. It takes it for granted and classifies them in relation to one another.

The systematic analysis of legal concepts by this School has led to the name **"Analytical School"**. It ignores both the historical origin in development of law or the ethical significance of law for its validity.

B. LAW AS THE COMMAND OF THE SOVEREIGN:

(Refer Austin's definition of Law
Chapter No. 2, Page No. 20)

C. THEORY OF SOVEREIGNTY:

(Refer Austin's definition of Law
Chapter No. 2, Page No. 20)

D. CRITICISM OF ANALYTICAL SCHOOL:

(Refer criticism of Austin's definition of Law
Chapter No. 2, Page No. 26)

E. NEO-AUSTINIAN SCHOOL:

Some of the followers of the Austinian School reconciled with the views of other schools. This set of jurists are referred to as Neo Austinian School.

Prof. Robson agreed that in England, because of the strict analytical approach of law, Jurisprudence never existed. Philosophy and Sociology were strangers to law. Thus the idea of the Neo Austinian School was to respond to the criticisms of Austin's school of thought and correct the lacunae in itself.

According to **Prof. J. Brown**, the Chief advocate of Neo - Austinian school, "Law is the expression of general will affirming an order. It is enforced by the organised power of the State. It is directed to realise some real or imaginary good".

This definition thus recognises both social aspect by the term **'general will'** and ethical aspect by the term **'real imaginary good'**. (These two elements were missing in the Austin's definition of law).

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What is the contribution of Analytical School to the nature and purpose of law?*
2. *According to Analytical School, law is a product of the State - Comment.*
3. *'Law is treated as imperative or command, emanating from the State - Analytical School' - Comment.*
4. *Write short notes on: (a) Analytical school of law (b) Neo – Austinian school (c) Theory of Sovereignty*

11. HISTORICAL SCHOOL/JURISPRUDENCE (SAVIGNY)

(IMPORTANT)

SYNOPSIS:

A. Introduction

B. Main Principles

C. Savigny's 'Volksgeist Theory'

D. Sir Henry Maine's 'Historical Theory'

E. Conclusion

A. INTRODUCTION:

The Historical School of thought developed in Germany in the 19th century. Its origin was as a result of determined reaction against rationalism, universalism and individualism of Natural Law. It directed its attention not to the **'abstract ideals'** but to the physical environment of law. Thus, the historical movement in Jurisprudence is called the **revolt of fact against 'fancy' and 'idealism'.**

B. MAIN PRINCIPLES:

1. History, traditions, customs, habits and religions are the true basis of law.
2. According to **Salmond**, historical Jurisprudence deals with the general principles governing the origin and development of law and also with the influences which affect the law. In other words, Historical Jurisprudence is the history of the first principles and conceptions of a legal system.

3. According to **C.G. Leg**, Historical Jurisprudence deals with law as it appears in its various forms at its several stages of development.

4. According to **Friedmann**, 'Law is found and not made. Law is self-existent. All laws are not of universal validity or of application. People develop legal habits as to its peculiar language, manners and constitution'.

5. Historical School concentrates its attention to the **primitive legal institutions of society**. Thus according to this school, **a typical Law is a customary rule spontaneously evolved by historical necessity and popular practice**.

6. Law is prior to the establishment of the State and thus it existed even before the State organisations came into existence.

7. Sovereign is only an enforcing authority of already existing laws. Thus law is independent of political authorities.

8. Historical Jurisprudence is different from legal History. Legal History traces how a particular legal system has grown, but Historical Jurisprudence studies the history of first principles and basic concepts of the legal system. Legal history is a store house from where the conclusions are drawn by a historical jurist.

9. The Historical school considered law in direct relationship to the life of the community and thus laid the foundation for building up the sociological school of law.

C. SAVIGNY'S 'VOLKSGEIST THEORY':

Savigny, a German jurist, is regarded as the **founder of Historical School**. He stressed the need to study law in it's course of development. The knowledge of law as it exists from time to time is essential for the correct understanding of law and for its reformation.

According the Savigny, **law is the manifestation of Volksgeist which means the true spirit of the people or the 'popular consciousness'**. Customs and Usages were the true spirit of the people and law must be discovered from such Customs and Usages. He stressed **'Law must be found and not to be made**.

Laws are not of universal application, as each person develops his own legal habits in his own environment'. The task of lawyers is to keep a constant vigil and find out periodically the correct consciousness in the changing habits of people.

Criticisms:

1. Savigny exaggerated the importance of Volksgeist. For e.g., the adoption of English Law in India is not due to the popular consciousness of the Indian people.

2. Certain laws arise not due to the 'correct popular consciousness', but due to conflict of interests between two classes of people.

For e.g., trade union laws are due to the onflict of interests between employers and employees.

3. Not all customary rules reflect the true spirit of the people. For e.g., when there are two local customs contrary to each other, both have the force of law.

4. Savigny's Volksgeist theory does not apply to laws applied by an Empire to its colonies. For e.g., English Laws applied in India before 1947.

D. SIR HENRY MAINE'S 'HISTORICAL THEORY':

Sir Henry Maine, an English Jurist is considered as **father of 'ancient comparative Jurisprudence'**. He compared the ancient Roman law and the ancient Hindu law. He traced the early developments in law and social institutions.

The evolution of contract, society, crimes, State, law of nature, codification etc., and their further developments with changes are dealt with by Sir Henry Maine elaborately in his books **'Ancient law'** and **'Village communities'**.

Thus the comparative study of legal institutions in various societies of different levels of historical development has stressed the importance of history in evolution of new legal principles.

Sir Henry Maine did not advocate the fanciful theory of "Volksgeist' as basis of law, but he brought to light many concepts of law as existed in ancient days which are of immense value even today.

E. CONCLUSION:

The Historical school lays importance on the evolution of legal concepts or legal process over a period of time which should be taken in formulating new legal principles. The nature of certain basic legal concepts cannot be better understood without reference to their historical development.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What are the salient features of Savigny's Historical School of law? State the reasons which prompted him to develop this new school.*
2. *What is the origin, nature and place of law in society according to the Historical School. Evaluate the contribution of Savigny.*
3. *What do you understand by "Historical Jurisprudence"? State the contribution of Savigny and H.S. Maine to the juridical thought.*
4. *Explain and distinguish between analytical and historical schools of Jurisprudence.*
5. *Discuss the scope and importance of the Historical School of Jurisprudence.*
6. *Write short notes on: (a) Savigny (b) Volksgeist theory (c) Sir Henry Maine (d) Historical theory*

12. PHILOSOPHICAL SCHOOL (IMMANUEL KANT)

SYNOPSIS:

A. Introduction

B. Explanation

C. Immanuel Kant's individual will and general will

D. Object of jurisprudence

E. Salmond's view

A. INTRODUCTION:

This school is also known by the names **Ethical School, Metaphysical School**.

The Chief exponents of this school are Francis Bacon, Hobbes, Locke, Blackstone, Grotius and Immanuel Kant.

These European particularly the German great philosophers influenced the philosophical basis for the knowledge of law.

B. EXPLANATION:

These philosophers deduced the legal philosophy from the Aristotelian principle that man is a rational and free willing person distinct from nature. This school speaks about the purpose of law and the justification of penal regulations by way of law to regulate the human conduct.

C. IMMANUEL KANT'S INDIVIDUAL WILL AND GENERAL WILL THEORY:

According to Immanuel Kant, law is the totality of conditions under which the free will of one man is united with free will of another person as per the general law of freedom.

In other words, the individual will is harmonised with the general will of the community through law. Law regulates the sphere of permissible free activity of each individual. The action of an individual must be in consensus with the general action of society.

Further, Immanuel Kant recognises only natural rights and not the acquired rights. According to him, the social contract i.e., the individual will obeying the common will is sacred and there is absolute duty to obey the common will which is in the form of legislative power. According tho him, the function of the State is to protect and act as guardians of law.

Immanuel Kant's philosophical theory of law was rejected by Neo-kantian theories. The Chief exponent of this theory is Stammler. According to him, law is not the spirit of people, but it is combining the sovereign and inviolable volition i.e., ordering human acts.

D. OBJECT OF JURISPRUDENCE:

Jurisprudence has two objects. The immediate object is to secure the liberty of individuals and the ultimate object is to attain 'human perfection'.

Liberty is an essential requirement to perfect the human personality. Thus the philosophical school is interested in developing the idea of justice as an ethical and moral phenomena.

In short - according to this school, law is the product of human reasoning and its purpose is to perfect the human personality.

E. SALMOND'S VIEW:

According to Salmond, the philosophical school of jurisprudence is a common ground of moral and legal philosophy. It combines morality with law. Legal rules are necessary to regulate the moral conduct of human beings. It is thus more ethical than legal. This theories go beyond the scope of law and hence could not be the whole basis of law.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain how philosophical school is the basis for jurisprudence.*
2. *The philosophical and the historical schools of jurisprudence have many common features - Comment.*
3. *Write short notes on: (a) Philosophical school (b) Kant's philosophical basis of law (c) Neo-kantian philosophical theory*

13. SOCIOLOGICAL SCHOOL

(SOCIAL ENGINEERING THEORY BY ROSCOE POUND)

(MOST IMPORTANT)

SYNOPSIS:

A. ***Introduction***

B. ***Definition and Explanation***

C. ***Exponents***

1. *Montesquieu*
2. *Auguste Comte*
3. *Ihering*
4. *Ehrlich*
5. *Leon Duguit (France) - Social Solidarity Theory*
6. *Roscoe Pound (America) - Social Engineering Theory*

D. ***Conclusion***

A. INTRODUCTION:

The Sociological School gained importance in the first decade of 20th century. It is the **revolt of function against fact of Historical School, interpretation of Analytical school and fancies of Philosophical School.**

It views that though the approach of these schools to the study of law are diverse in nature, they are all concerned with the consideration of law in relation to society. Thus the Sociological school draws inspiration from these schools, but attaches importance to relations of law to social institutions.

B. DEFINITION AND EXPLANATION:

Ihering defines law as the sum of the conditions of social life in widest senses as secured by the power of the State through the means of eternal compulsion.

Law and Social Change (Law and Society):

Law is generally understood to be a mirror of society a reflection of its customs and morals that functions to maintain social order. Sociological school looks upon law as a social phenomenon. Law must be concerned not on individuals but on human society as a whole, i.e., the external relations of its individual members.

The jurists must therefore concentrate on the social purpose and interests served by law. Every legal institution must be inspired by a social purpose and must change when the social purpose undergoes a change.

C. EXPONENTS:

The eminent jurists of the School are:

1. Montesquieu
2. Auguste Comte
3. Ihering
4. Ehrlich
5. Leon Duguit
6. Roscoe Pound

1. Montesquieu:

Montesquieu (France) was the first to recognise the influence of social conditions on law. He said that law should be declared on the basis of a nation's inherent characteristics like religion, commerce, customs, manners, occupation and motives.

2. Auguste Comte:

Auguste Comte (France) is considered to be the founder of the sociological school. Law must be the outcome of the scientific study of the society and the social groups.

3. Ihering:

Ihering (Germany) is considered to be the father of modern sociological Jurisprudence. According to him, the origin of law is to be found in social struggles. He wanted law to be a **'living law'**. Law is only an instrument for serving the needs of the society. Its purpose is to protect and progress the interests of society. Human conduct is determined not by **"because"** but by **"for"** i.e., the purpose to be served.

4. Ehrlich:

Ehrlich (Austio - Hungary) - Law is located in the present day constitution of the society. Basic institutions of the social order like marriage, inheritance etc., govern the fundamental arrangements of society. Thus Ehrlich attaches great importance to the study of 'living law'.

The source of law is both the modern legal documents and direct observation of life like customs and usages, domination, possession and declaration of will. By 'Living Law' 'Ehrlich means extra-legal controls of social relationships. The centre of gravity of legal development lies in the society.

Law is more closely related to life in the society. It concerns the present rather than the past. It tries to analyse the social function of law.

According to **Friedmann**, Ehrlich's theory has **three** main weaknesses:

a. The theory does not distinguish legal norms from social norms.

b. According to Ehrlich's theory, custom is not merely a source of law but a type of law, which is wrong. In modern days, custom does not automatically become a law, unless approved by legislation or judicial decision.

c. Sometimes legislations and precedents impose a new principle which the society may not be practising till then. For e.g., Dowy Prohibition Act, Prohibition Act, etc.

5. Social Contract Theory:

According to the social contract theory, in earliest history, man lived in a state of nature. No government existed. Each man was secure only with his own power and mental awareness.

By agreeing with one another to make a 'State by contract', men in a given area joined together, each surrendering personal freedom as necessary to promote the safety and well being of all. By this contract, the members created a government. The social contract gives rights and responsibilities to both the citizens and the government.

For eg., Citizens have given the powers of prosecution and punishment of criminal offences to the judicial branch of Government.

The Government, in turn, bears the responsibilities of maintaining public order and safety of the citizens through police and court systems.

6. Leon Duguit (France) Social Solidarity Theory:

For smooth carrying on the life of a person he has to depend on the service of follow men. The social interdependence helps in creating social solidarity by mutual assistance and division of labour.

Law is an aspect of social solidarity. Law should help increasing 'social solidarity' to facilitate a happy life in the society. Things and matters which prejudices 'social solidarity' must be discouraged.

For e.g., arbitrary abuse and powers by Sovereign, illimitable powers of Sovereign, etc. Judicial Review and Principle of State responsibility, on the other hand, are welcome as they aim at social solidarity.

Duguit rejected the Natural law theory and theory of fundamental rights. The only right a man can possess is the right to do his duty to the society forever. He further does not accept democracies having multi-party system, as they are against social solidarity.

The functional approach to social denial of bad laws, distinction between public and private laws, decentralised administration etc., - all these ideas of the theory influenced Russian Soviet Jurisprudence.

7. Roscoe Pound (America) - Social Engineering Theory:(Social Interest to be protected by law)

Among the advocates of sociological Jurisprudence, Roscue Pound is an eminent Jurist.

According to him, Social Engineering means the **balancing of competing interests in society to form law**. By 'interest', he means a claim or wants of a person or group of persons, which he or they seek to satisfy.

The competing interests can be divided into **three** types:

i. Public Interests

ii. Private Interests

iii. Social Interests

The authority, before making law, must take into consideration all the above interests, study the impact of the law on these interests, etc.

i. Public Interests: State (interests) include:

a. Maintenance of State integrity

b. Maintenance of just balance of conflicting interest of its people

ii. Private Interests: include:

a. **Individual interests of personality** like physical integrity, privacy, reputation, freedom of belief and opinion, etc.,

b. **Interests of domestic relations** like marriage, guardianship, relations of husband and wife, parents and children, maintenance, etc.

c. **Interests of substances** like property rights, inheritance and testamentary succession, freedom of contract and of trade, etc.

iii. Social Interests*(Law and Society): *These include:

a. **General security** like maintenance of peace and order, health and safety, security transactions and acquisitions.

b. **Security of Social Institutions** like marriage, religious places and institutions.

c. **General morals** like action against fraud, corruption, gambling, prostitution, etc.

d. **Conservation of Social resources** like food grains, public transports, etc.

e. **General Progress** like development of human powers, satisfaction of human wants by **four** major policies.

i. Freedom of property.

ii. Free trade and protection against monopoly.

iii. Freedom of industry.

iv. Encouragement of inventions by grant of patent rights.

f. **Individual personality** by freedom of speech, freedom of profession and trade, etc.

The above interests should not be taken as rigid. The importance of each interest changes with changing political philosophy, social experience and time. These interests are to be considered both by the Legislators and by the Judges for balancing and harmonising them.

For such balancing and harmonising the interests, - logic, utility and the accepted standards of right conduct may act as guides. The interest which outweighs one another can be known only by experience, study and reflection and sometimes from life itself.

Law should be uniform and certain, but not at the cost of damage to social welfare.

D. CONCLUSION:

Sociological school caused a change in the general approach to law itself and it has impressed on the judges - the need to enquire into the social facts underlying any legal problem.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss the Sociological approach to law.*
2. *Examine the function of law according to Sociological School of Jurisprudence.*
3. *Sociological Jurisprudence according to Pound, should ensure that the making, interpretation and application of laws take account of social facts - Dias. Explain.*
4. *'The growth of literature styling itself the sociology of law or Sociological Jurisprudence is comparatively modern and its distinguishing features are not easy to determine'. Comment critically.*
5. *'The historical school of Jurisprudence laid the foundations on which the sociological school built its edifice' - Elucidate.*
6. *Write short notes on: (a) Roscoe Pound (b) Social Solidarity Theory (c) Social Engineering Theory d) Law and Society.*

14. ECONOMIC SCHOOL OR SOVIET SCHOOL
(KARL MARX AND ENGLES)

SYNOPSIS:

A. *Introduction*

B. *Factors that led to the growth of Economic School*

C. *Karl Marx's Economic and Socialistic Theory*

D. *Soviet practice after 1917*

E. *Development after 1931 in Soviet Russia*

F. *Working System of Courts in Soviet Russia*

G. *Soviet after the President Mr. Breshnov's rule*

H. *Conclusion*

A. INTRODUCTION:

Economic School considers the nature of law as a reflex of an economic substrate of the State. This interpretation of law is on the basis of social and political theories of **Karl Marx** and **Engles**.

Soviet Russia and China were the first countries to apply this concept and recently some other countries have copied Russia.

B. FACTORS THAT LED TO THE GROWTH OF ECONOMIC SCHOOL:

1. The failure of religious ideals to stand up to critical scrutiny led to the substitution by materialist ideals.

2. The critical thinking of the people about the inadequate existing legal system has led to discover a new system.

3. The poor and the working class supported the Economic school, as they found new hope and encouragement in this School of thought.

4. According to **'Pashukan'**, the laws which were instruments of capitalist oppression would disappear on the establishment of socialism.

C. KARL MARX'S ECONOMIC AND SOCIALISTIC THEORY:

1. The ownership of means of production must be in the hands of community.

2. Socialism calls for justice against hardships caused by a minority who monopolised the means of production and used it for an unfair domination over the majority of economically weaker classes in the society.

3. This theory demands laws which would remove the causes of social and economic inequalities.

4. The theory attaches faith of the emancipation of the working class in the national economic planning.

5. Laws are to be adapted and changed in tune with the economic planning.

6. According to this theory, citizen of the society is a person who puts the interest of the society first and

his own as second. It is with a sense of collectivism which in long run would protect individual interests.

7. It emphasises the interest of the society as most important and places the individual only as a limb of the society.

D. SOVIET PRACTICE AFTER 1917:

In 1917, after the fall of King Zar, communism came in through the preacings of Karl Marx. The important aspects of Soviet practice of Karl Marx Economic School of thought are as follows:

1. Even the fundamental freedoms of the citizens must be in conformity with the interests of the working people and to strengthen the socialist system of Government.

2. The Soviet approach to penal law lays emphasis on social dangers.

3. Guilt was decided by the threat to the society and such guilts were mostly punished.

4. Soviet system justified with holding of a legislation from publication, if it is required in the interests of the society.

5. Administrative decisions prevailed over laws on certain social consideration. The concept is that no individual could think of any right to be asserted against the State.

6. The 'Guiding Direction' to Courts in interpretation of laws are given by the administrative authorities.

E. DEVELOPMENT AFTER 1931 IN SOVIET RUSSIA:

1. Public Corporations were established to manage nationalised enterprises and had limited autonomy in making contracts. This led to the establishment of special commercial Courts with powers to grant specific performance, damages, etc.

2. Forced labour camps were dissolved.

3. Free dissolubility of marriages were abandoned and a strict divorce proceedings started in Courts.

4. Convictions were limited to express provisions of law.

5. In 1936, private property by citizens in the form of houses, tools and livestock were recognised. Testamentary Succession, compensation for breach of contract, etc., were also recognised.

6. After 1961, all instructions and supervision of subordinate Courts were done by Supreme Court only and not by other administrative authorities.

However, no exercise of civil right contrary to the purpose of socialistic society was tolerated. The Courts were to help the building up of a stable Communist society. The laws were administered by Courts to train the working people in the State administration.

F. WORKING SYSTEM OF COURTS IN SOVIET RUSSIA:

1. Ordinary civil and criminal cases were tried by People's Court consisting of a judge and two peoples' assessors - all elected by direct voting of the people of the respective districts for a period of five years.

   Any citizen eligible to vote can be elected as a Judge or People's Assessor. Every people's assessor sits for 10 days in a year on rotation.

2. The Supreme Court Judges were also elected and had two People's Assessors. The Supreme Court tried serious cases and heard appeals from the lower Courts.

3. Public condemnations of social and economic crimes were welcome and wide publicity about the trial was given. Public condemnation, press comments, etc., were considered while inflicting severe punishments.

G. SOVIET AFTER THE PRESIDENT MR. BRESHNOV'S RULE:

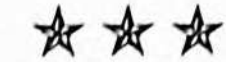
Democracy blasm in Soviet after Mr. Breshnov took over as President of Russia. The U.S.S.R. broke into five separate nations and Russia retained its identity. The Economic School of law also broke down and free elections were conducted. The Western democracy had taken roots in Russia and the Rule of Law started gaining importance.

H. CONCLUSION:

At the dawn of 20th century, the Economic School has brought about colossal changes in the legal concept. It put the interest of the society first and emphasised the sacrifice of individual's interests for the welfare of the society, but unfortunately the system failed in Russia, but still going stronger in China.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Give a brief account of the economic approach to law with particular reference to the Doctrines of Karl Marx.*
2. *What are the factors that led to the growth of Economic School?*
3. *Write short notes on: (a) Karl Marx (b) Soviet school (c) Economic school*



15. STATE - ITS ESSENTIAL ELEMENTS AND KINDS OF STATES

(IMPORTANT)

SYNOPSIS:

A. Definition

B. Ingredients / Elements of State

C. Theories of origin of State

D. Divine origin theory (Origin Of State)

E. Functions of State

F. Kinds / Types of States

A. DEFINITION:

A State is a social kind of society which formulates and enforces laws. It is a product of political organisation of men. Salmond defines a State as: "A Society of men established for the maintenance of order and justice within a determined territory by way of force".

B. INGREDIENTS: (ELEMENTS OF STATE)

To form a State, the following **four** elements are necessary:

1. The Government:

It is an organised authority to direct and control the exercise of powers. It may be appointed by a Director or by the people through their representatives. It aims at common welfare. It has three branches namely - Legislative, Executive and Judiciary. Each one is independent in its action and sphere. It is called **Separation of powers**.

2. Sovereignty:

The organisation of State must be stable and permanent. It must receive habitual obedience from its Subjects.

3. Territory:

The State should have a definite portion of earth's surface for its position and control.

4. Large Population:

The population in a State must be considerably large.

C. THEORIES OF ORIGIN OF STATE:

The origin of the State Organisation to control and govern the people is explained by **two** theories.

i. Evolutionary theory
ii. Social Contract or Compact theory

D. DIVINE ORIGIN THEORY (ORIGIN OF STATE):

Divine origin theory is one of the main theories put forward by the political philosophers regarding the origin of the State.

The most important theories are (a) The Theory of Divine Origin (b) The Force Theory (c) The Patriarchal and Matriarchal Theory (d) The Social Contract Theory.

This is the oldest theory regarding the origin of the State. It is familiarly known as the **'Theory of Divine Right of Kings'**.

POSTULATES OF DIVINE ORIGIN THEORY:

According to Divine Origin Theory, the State did not come into existence as a result of human. It is divine creation. God founded the State. The Ruler of State derives his Authority from God.

The Ruler is responsible for his actions to Him alone. Obedience to the dictates and orders of the King (Ruler) is an unpardonable sin. The main theme of the Theory is that a King is above law. He is not subject to the authority of any person or persons other than God.

EVOLUTION OF DIVINE ORIGIN THEORY:

1. The Divine Origin Theory is as old as the state itself. It was universally popular among the early people. The earliest rulers combined in them both the political and religious power and they were known as Priest Kings.

2. The idea of Divine Origin of the State is practically found in every religion. In some religions, it is expressed and in others, it is implied.

3. The chief exponents of this theory were the Jews. In the Old Testament, there are repeated references to the conception that God selects, appoints, dismisses and even slays Rulers. The King owes responsibility to God alone for his acts.

4. According to St. Paul, the Christian belief is in Divine Origin of State. Filmer in his book Patriarcha argues that Adam was the first king and present kings are His heirs.

5. In ancient Hindu mythology, similar views regarding the origin of State are found. Main reference to this Theory is found in Mahabharata in the words that when the world was in the State of anarchy, the people approached God and requested him to provide a remedy. God appointed Manu to rule over them.

6. Obedience to the State and Kings was both a religious and civil duty and disobedience was sacrilege. Religion and politics then were inseparable.

7. The Divine Origin Theory was equally supported by the ancient Greek and Roman philosophers namely Plutarch, Hegel and others.

To conclude, the Divine Origin Theory remain popular as long as religion is considered to be the chief motivating force of human activity.

CAUSES OF DECLINE OF DIVINE ORIGIN THEORY:

With the development of scientific outlook, decline of religious influence etc., the theory has started losing its importance.

1. The Theory of social contract proved that the State was a human creation, a hand work of man and not a divine creation.

2. It was the voice of people which became the voice of God. In the present days, democracy is the voice of people only.

3. The separation of the Church and the State (politics) also led to the decline of the Divine Origin Theory.

4. The growth of scientific knowledge and materialistic approach made the theory of Divine Origin of State further decline.

1. Evolutionary Theory:

There are **two** approaches to this theory.

a. Matriarchal Theory by Molennan and Morgan:

In certain communities in India and Australia, the savage life discloses the theory of Mother's right and Mother's relationship.Since female infanticide was practised by these races, there were scarcity of women.

The women married more than one man (polyandry). The husband became part of the wife's family, and the descent was traced through the mother. This system gave the wife and the mother - a social standing.

Thus the matriarchal (through mother) relationship of family by expansion and continuation formed the State in the ancient society. According to **Maclner**, the Family Property, the Customary Law, the War and the Conquest formed the State.

The main criticism against this theory was that polyandry was confined only to certain races and not universal.

b. Patriarchal Theory:

The matriarchal society was replaced by Patriarchal society where the oldest living male ascendantant became the authority of the society which was an aggregation of many families. According to **Plato and Aristotle** - the Roman Family, the Hindu Joint Family were all Patriarchal.

According to **Sir Henry Maine**, the ancient society were not numerically strong to exercise authority over a wide territory. But as time passed on, the society multiplied and formed strict rule of Kingship, thus laying the foundation of modern State.

2. Social Contract or Compact Theory:

Sir Hobbs, Rousseau and **Sir John Locke** are the exponents of this theory. According to them, the origin of State is due to the outcome of Social Contract.

According to **Sir Hobbs**, in ancient days, **"Might was Right"** and man lived in a State of war with violence existing everywhere. Slowly, he entered into agreements with like persons to create an Authority who would rule over them.

Thus, people surrendered their natural rights of liberty to a single person or body of persons called the Sovereign for the sake of gaining security of life for them.

According to **Rousseau**, the necessity of self survival and greediness to acquire another man's property brought about violence among the people.

Realising their follies, people entered into contracts with one another by surrendering their rights to the community as a whole, which would act for their general good.

According to **Sir John Locke** - in ancient days, there was total uncertainty due to varying intelligence of men. To avoid the uncertainties, people entered into contracts among themselves by surrendering their rights for the consideration of preservation and protection of their rights.

Sir Henry Maine criticises the social Contract or Compact Theory as follows:

1. The historical evidence shows that the concept of contract was of very late origin and therefore there could not have been contracts in the primitives societies.

2. Even when State organisations were present in the primitive societies, the position of individuals was decided by status of birth and not by contract.

   For e.g., the son of a slave continued to be a slave because of his birth in a slave family. Thus status was the basis of the primitive society and not contract.

E. FUNCTIONS OF STATE:

1. Defence against external enemies and administration of justice.

2. Maintenance of peace, law and order.

3. Supply of the basic necessaries of human life.

4. Suppression of internal disturbance and control over all the members of the society.

5. Legislative and taxation functions.

6. Promotion of the welfare of the community.

F. KINDS / TYPES OF STATES:

1. Independent State:

The independent State has separate existence and is complete in itself.

2. Dependent State:

A dependent State is not complete in itself. The Sovereignty is not absolute. For e.g., India before Independence.

3. Unitary State:

It does not include another State within itself. For e.g., in England, there is no State Government but only one Central Government.

4. Composite State:

It is made up of many States which finally make a State.

5. Imperial State:

The entire Sovereignty lies with the Central Government. The State Government gets power from the Centre.

6. Federal State:

Sovereignty is shared between the Central Government and the State Governments. For e.g., India, U.S.A. etc.

Prof. Wheare defines **"Federalism"** as the method of dividing powers so that the Central and Regional Governments are each within a sphere, co-ordinate and independent.

Both the Federal (Central) and the Regional Governments co-ordinate but independent in their spheres and not subordinate to one another.

A Federal Constitution usually has the following essential characteristics:

1. Supremacy of Constitution
2. Written Constitution
3. Rigid Constitution (not flexible)
4. Distribution of Powers between federal and regional governments
5. Independent Judiciary
6. Bicameralism (presence of legislative assemblies both at the federal and regional governments)

7. Confederate State:

In the confederate, the State Government is independent completely and it can separate from the Central Government. By agreement, it is attached with the Central Government. For e.g., Switzerland and U.S.A. before 1787.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the various types of States. Briefly explain the different functions of State.*
2. *Enumerate the functions of a State and explain the functions which cannot be avoided by the State.*
3. *Explain the various theories regarding origin of State.*
4. *Write short notes on:*
   - *(a) Unitary State*
   - *(b) Federal State*
   - *(c) Confederate State*
   - *(d) Imperial State*
   - *(e) Evolutionary theory*
   - *(f) Social Contract or Compact theory*
   - *(g) Matriarchal theory*

16. STATE AND THEORY OF SOVEREIGNTY (AUSTIN AND SALMOND)

SYNOPSIS:

A. *Austin's definition of Sovereignity*

i. *Definition of Sovereign*

ii. *Essentials of Sovereign*

iii. *Fundamental propositions of Sovereign*

iv. *Sovereign and Unitary Constitutions*

v. *Sovereign and Federal Constitutions*

B. *Salmond's definition of Sovereignity*

i. *Sovereign power is determinate*

ii. *Sovereign power is limited*

iii. *Sovereign power is divisible*

C. *Conclusion*

A. AUSTIN'S DEFINITION OF SOVEREIGNITY:

I. DEFINITION OF SOVEREIGN:

According to **Austin**, a Head of a State to be called as Sovereign must comply with his definition of Sovereign which reads as follows:

'If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from a bulk of a given society, that determinate

superior is Sovereign in that society and the society (including the superior) is a society – both political and independent'.

II. Essentials of Sovereign:

The following are the essentials as per the above definition:

1. The Sovereign must be a determinate human superior.

2. He must not be in the habit of obedience to any other superior.

3. He must receive habitual obedience from the bulk of the people in the society.

4. The society must be of independent political society.

III. Fundamental propositions of Sovereign:

The following are the fundamental propositions drawn from the above definition:

1. Sovereign power is **essential** in every State.
2. The Sovereign power is legally **unlimited**.
3. The Sovereign power is **indivisible**.

IV. Sovereign and Unitary Constitutions:

As per the definition of Sovereign by **Austin**, the British Parliament is an example of Sovereign power.

The power is centralised in one Government under the Unitary Constitution. It can make and unmake any and every law, change the form of Government and is legally omnipotent.

Dicey also supports Austin stating that the British Parliament has unlimited Sovereign power.

Criticism:

However **Jennings** says that in the method of legislation, there are a lot of limitation of powers on the British Parliament and hence British Parliament is not strictly Sovereign.

Salmond also says that the ***de facto*** limitations may amount to legal limitations and in such a case, the Sovereign powers become limited.

For e.g., Courts of justice habitually decide that certain functions are outside the scope of legal Sovereign power as recognised by the Constitution and hence as per the definition of Austin, he cannot be a Sovereign in these functions.

V. Sovereign and Federal Constitutions:

The characteristics of Federal Constitutions are as follows:

1. Sovereign is not supreme, but only the Constitution which is supreme.

2. The Constitution must be a written Constitution.

3. The Constitution must be rigid. It means that amendment to the Constitution must be very difficult.

4. There must be distribution of powers of the State to other co-ordinating body/bodies controlled by the Constitution.

5. There must be an independent judiciary to interpret the provisions of the Constitution.

All these features of Federal Constitutions clearly show that the Sovereign power is not unlimited and it is controlled by a written Constitution and also by an independent Judiciary.

Further the Sovereign power is not indivisible, because under the Federal Constitution, the powers are distributed between the State and other bodies and again even in the powers of the State, they are distributed among the legislative, executive and judiciary wings.

According to Austin, Sovereign means legislative Sovereignty which is unlimited and indivisible, but according to Bryce - in Federal Constitutions, 'Legislative Sovereignty is divisible, that is, different branches of it may be concurrently vested in different persons (or bodies), co-ordinate altogether or co-ordinate partially only, though acting in different spheres'.

Hence as per Austin's definition, Federal Constitution is not Sovereign.

B. SALMOND'S DEFINITION OF SOVEREIGNITY:

I. SOVEREIGN POWER IS DETERMINATE:

According to **Salmond**, Sovereign authority is essential for every political society, but Sovereign power lies with the **series of superiors and inferiors** and not in one determinate person or body.

In other words, as per Salmond, Sovereignty is found in the entirety of State and may even wholly or partly external to the State also.

II. SOVEREIGN POWER IS LIMITED:

According to Salmond, Sovereignty may be legally limited in that every Sovereign may have legally determined limits and within such limits, his powers may be unlimited.

III. SOVEREIGN POWER IS DIVISIBLE:

According to Salmond, Sovereign power is divisible among legislative, executive and judiciary and between Central Government and State Governments or other co-ordinating bodies.

C. CONCLUSION:

Austin's theory of Sovereignty is of no use for Federal Constitutions like U.S.A., Australia and India.

Whereas as per Salmond's theory, not only Unitary Constitution like U.K., but also Federal Constitutions like U.S.A, Australia and India are Sovereign Constitutions.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define State and explain the salient features of a State. Examine the inter relationship between State and Sovereignty.*

2. *Positive law consists of commands set as general rules of conduct by a Sovereign to a member or members of the independent political society – Austin. Comment.*

3. *Does Salmond's definition of law fit into a federal State. How is it different from that of Austin's?*

4. *Write short notes on: (a) Theory of Sovereignty (b) State and Sovereignty (c) Federal State (d) Unitary Constitution.*

17. LAW, KINDS OF LAWS AND FACT
(FUNCTIONS AND PURPOSE OF LAW)

SYNOPSIS:

A. Introduction

B. Nature of Law

C. Characteristics of Law

D. Value of Law

E. Question of Law and Question of Fact (Law and Fact)

F. Presumptions (Presumptive proof)

G. Legal Fiction

H. Law and Morality/Ethics

I. Law amd Equity

J. Kinds of Laws

i. General Law

ii. Special Law

K. Law Merchant (Lex Mercatoria)

K. Delegated Legislation

L. Special Act Vs. General Act

M. Functions and Purposes of Law

A. INTRODUCTION:

The term 'law' is defined as various jurists and the aim of law is to regulate the conduct of the people. Whereas the ,term fact means and includes occurrence or happening or non-happening of events, acts, incidents and accidents.

It is what is perceived by the six senses of the human body. It also includes the facts as discovered and intended by Science.

The Courts are confronted with both questions of law and questions of facts for decision and hence it is necessary to know the differences between the two.

B. NATURE CHARACTERISTICS AND PURPOSE OF LAW :

The nature of law presupposes the following aspects –

1) L aw is a unique social-political phenomenon

2) It has more or less universal characteristics which can be analyzed through philosophical analysis.

3) The nature of law is meant to be universal.

4) It assumes that law possesses certain features, and it possesses them by its very nature, or essence, as law, whenever and wherever it happens to exist.

5) It purports to guide human behavior, giving rise to reasons for action. However, law is not the only normative domain in our culture. Morality, religion, social conventions, etiquette, and so on, also guide human conduct in many ways which are similar to law.

6) The understanding of the nature of law consists in an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on such other normative orders, like morality or social conventions.

7) The moral content of above norms also bears on their legal validity. As the famous dictum of Saint Augustine has it: 'lex iniusta non est lex' (unjust law is not law).

There are two major schools of thought regarding the approaches to explain the nature of law.

1) Naturalist school

2) Positivist school

C. CHARACTERISTICS OF LAW:

A close and careful analysis of various definitions of law reveals that law is a body of rules recognised and maintained by the state to regulate the human behavior and conduct in a society.

The main characteristic of Law are as follows:

1) It is a set of rules.

2) It regulates the human conduct

3) It is created and maintained by the state.

4) It has stability, fixity and uniformity.

5) It is to bring justice and order to a society.

6) It is to settle the differences between men.

7) It is backed by coercive authority.

8) Its violation leads to damages, penalty and / or punishment.

9) It is the expression of the will of the people and is generally written down to give it definiteness.

10) It is related to the concept of 'sovereignty' which is the most important element of State.

11) A good law keep away men from infringing the rights of others to pursue life, liberty or happiness.

12) It defines boundaries to resolve issues between men, which might otherwise be resolved by the strong taking advantage of the weak directly.

13) It has to be fair. It should not be aimed at a particular person or group of people.

14) It is enforceable against an identifiable act.

15) It is viable so that people are able to comply with it.

16) If it is a criminal law, it carries a specific range of punishment.

17) It is constitutional.

D. VALUE OF LAW:

1. This subject of law has its own intrinsic interest and value because this is a subject of serious research;

2. The researches in Law contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts.

3. Law also has an educational value. It helps in the logical analysis of many concepts and it sharpens the logical techniques of the lawyer.

4. By understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual rule of law. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests.

Therefore, some logical training is necessary for a lawyer which he can find from the study of Law.

6. It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.

7. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of law which trains his mind to find alternative legal channels of thought.

8. Law helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators .

9. Professor Dias said that ' law concerns human thought in relation to social existence'.

E. QUESTION OF LAW AND QUESTION OF FACT: (LAW AND FACT)

Every question which requires a decision in a Court of law may be either a question of law or a question of fact. Sometimes, it may also be a combination of both question of law and question of fact.

I. QUESTION OF LAW:

A question of law relates to the following **three** aspects:

1. A question which the Court is bound to answer as per a rule of law i.e., a legislation or an enactment. Here, the law has the answer for the question in itself and so the Court cannot decide otherwise by applying the principles of truth or justice.

   In otherwords, it has no authority to decide otherwise than the rule of law.

2. The question of law further relates to a question for which - as to what the law is on the particular point of the question.

   Sometimes, the lower Court may not know or uncertain as to what the law is for a particular question of law and so it refers to the higher Court for guidance i.e., to ascertain the exact law applicable to such question of law.

3. In England, all questions of law are decided by the judges, but all questions of fact are decided by juries, but in India - there is no such system of juries and hence this distinction does not apply in India.

II. Question of Fact:

1. All questions which are not questions of law - are questions of fact. Even in the question of fact, it does not include all questions which are not questions of law, but only some of such questions.

2. The question of fact are not subject to judicial discretion. By applying judicial discretion, the judge

decides what is right, just and equitable in a question which has not so far been decided by any law. The question of fact, on the other hand, relates to facts provable by evidence.

3. The question of fact is a matter of fact and it is opposed to matter of opinion. The question of fact can be ascertained by evidence and can be demonstrated.

A question of opinion cannot be answered by evidence or by demonstration.

F. PRESUMPTIONS: (PRESUMPTIVE PROOF) (LEGAL PRESUMPTIONS)

Presumption means an inference - affirmative or disaffirmative - of the existence of some fact drawn by a process of reasoning from something already proved or taken for granted. Presumption may also be made for affirmation or falsehood of doubtful fact. It is the inference by the Court.

TYPES OF PRESUMPTION:

1. 'May presume' or Presumption of fact or Natural Presumption:

These are inferences naturally and logically drawn from experience and observation of human mind, action, habits, etc. Here the Court may presume a fact and it may either regard such fact as proved unless and until it is disproved or it may call for proof of it.

The Court may presume in the following instances:

a. If a man is in possession of stolen goods soon after theft, then it is presumed that he is the thief or a person who has received the goods knowing them to be stolen. It is purely a question of fact and not law.

   If the accused says that he is not the thief or a person who had received the goods knowing them to be stolen, he has to prove that he is not the thief or receiver of stolen property. By the continuity of facts, the Court presumes that he is the thief and it presumes him as thief till he disproves it.

b. The Court may presume that judicial and official acts have been regularly performed. It may presume like that, till it is disproved.

The word "may" in the definition shows that it is not obligatory on the part of the Court to presume such facts always. It is left to the discretion of the Court to accept the presumption or to reject it.

But the Judges must follow some guidelines for taking a decision of rejection or acceptance. So the presumption of fact are not at all binding on the judges.

2. *Rebuttable presumption of law or "Shall presume":*

Here the Court shall presume a fact and it shall regard such fact as proved unless and until it is

disproved". The judges have no discretion and they should presume a fact. But the presumption of the judges can be disproved by the other party.

In all criminal trials, the presumption is that the accused is always innocent. This is presumption directed by law and hence termed presumption of law. But the presumption can be rebutted by the prosecution side proving that the accused is not innocent. So, it is termed as rebuttable presumption.

3. *Irrebuttable presumption of law or Conclusive proof:*

When a law declares one fact to be the conclusive proof of another, the Court shall take this as conclusive proof and shall not take evidence to disprove it.

Here, the judges have no discretion and they have to accept as if such presumption is proved. The best example is Sec. 82 of I.P.C "Nothing is an offence which is done by a child under 7 years of age".

In this case, even though the child has committed an offence, the Court cannot punish it. It is a direction of law and it cannot be rebutted.

So it is an irrebuttable presumption of law. In the same way the Court presumes a contract as void *ab initio* (from the beginning) if it is entered into with a minor.

G. LEGAL FICTION:

Legal fiction is defined as:

a. A legal assumption that a thing is true which is whether or not true, or which is probably false as true.

b. An assumption of law that something which is false as true.

c. A state of fact exists which has never really existed.

A legal fiction is a device by which the law deliberately departs from the truth of things for some reasons.

For e.g., under the Roman Law, the averment that the plaintiff was a Roman Citizen, when in truth he was a foreigner. It was a fiction of Roman Law. The object of these fictions was to confer jurisdiction on the Court so as to bring aliens within the jurisdiction of Roman Civil Law.

'Legal fiction' is created in the provisions of an enactment by using the terms **'is deemed'**. The deeming provision is meant for the purpose of assuming the existence of a fact/facts which do not really exist.

In certain enactments, legal fiction may be created even without using the word 'deemed'.

Legal Fiction and Presumption:

A legal fiction is one which is not an actual reality but which the law requires the Court to accept it as reality. Therefore, in case of legal fiction, the Court believes something to exist which, in reality, does not exist.

It is nothing but a presumption of the existence of affairs which in actual reality does not exist. There is not much difference between a legal fiction and a presumption.

They are identical in all respects with only one difference namely legal fiction is a conclusive proof whereas presumption (except conclusive proof) is rebuttable also.

Court and Legal Fiction:

1. The function of the Court is to ascertain for what purpose the 'Legal fiction' is created. In this connection, the Court has to assume all facts and consequences which are incidental for giving effect to the fiction.

2. In interpreting the fiction, the facts and consequences are not to be extended beyond the purpose for which it is created i.e., beyond the language of the section by which legal fiction is created. The facts and consequences cannot also be extended importing another legal fiction.

3. A legal fiction enacted by using the words, ' for purpose of this Act' is normally restricted to that Act and cannot be extended to cover another Act.

4. Delegated legislations may also create such legal fictions. However, Legal fiction created by the Legislature in an Act, cannot be widened by rules made under the Act or under the delegated legislation.

5. Facts can only be deemed to exist under a legal fiction and not consequences. This is an important rule of interpretation.

6. When a statute enacts that something is deemed to have been done, which in fact is not done, the Court is bound to ascertain for what purposes the statutory fiction has to be resorted to.

7. After ascertaining the purpose of the legal fiction, 'full effect must be given to the statutory fiction' and it must be carried to its logical conclusion.

8. It is necessary to assume all facts on which alone the fiction can operate. If imaginary state of affairs is treated as real, it is necessary to imagine the consequences as real.

Thus if A is deemed to be B, compliance of A is in law, compliance of B and violation of A is in law, violation of B.

H. LAW AND MORALITY/ETHICS:

To understand morality, it is necessary to know the terms namely law, ethics and positive morality.

I. LAW AND ETHICS:

Ethics evolve rules which are good in themselves. Ethics concentrates on principles affecting a man's conduct and determines the standard of right and wrong.

Law may contain atleast a minimum ethic. For law, the rules of ethics are not obligatory.

Ethics deals with the absolute ideals, but positive morality consists of the actual moral standards adopted in any community. The morality is enforced by the sanction of public opinion.

II. LAW AND MORALITY:

Sanctions in positive morality are not applied by an organised machinery of the State, but only by force of public opinion.

Positive morality determines the upper and lower limits of the effective operation of law.Law resembles Religion more closely than ethics, because Religion has also belief that sanction for immoral acts will be through the authority of God.

Law prescribes external conduct of man whereas morals prescribe internal conduct of man. Morality help in development of legal rules and moral pressures help filling the gaps in the legal system.

Good order is what law, justice and morality demand. Inequitable laws are to be resisted and to be disobeyed. Moralities and law reciprocally influence each other. Morals are the concern of the law whether in private or in public.

Legal system is concerned with right standards of behaviour. For people who have no moral knowledge, the law is the only standard.

Law influences public opinion and conversely public opinion influences the law. The law should lay down the right standards appreciable by the right thinking people.

I. LAW AND EQUITY:

LAW:

The system of law is a set of rules of conduct of any organized society that are enforced by threat of punishment if they are violated. Modern law is broad in scope and it regulates many branches of conduct.

Law may be statutory law or common law. The Courts of England developed common law, which are judicial legislations, as opposed to enacted statute law.

Common law is based upon precedent in which previous decisions are followed to ensure a uniform application of the law to similar situations.

EQUITY:

Equity is the name given to the 'set of legal principles', following the English common law traditions, which supplement strict rules of law

The word 'equity' is the body of principles constituting what is fair and right.It is a synonym of 'Natural law'.

Equity is commonly said to "mitigate(reduce) the rigor(strictness) of common law", allowing courts to use their discretion and apply justice in accordance with natural law. In practice, modern equity is limited by substantive and procedural rules.

There are '12 vague ethical statements' that guide the application of equity. It refers to fairness, impartiality or evenhanded dealing. The principles of equity is used to correct or supplement the law as applied to particular circumstances.

Judges decide cases by equity, when the statute is not clear on the deciding issues. In this context, it is termed as 'natural equity'. A historical criticism of equity was that it had no fixed rules of its own and it is judging the issues according to judge's own conscience.

The rules of equity later lost much of their flexibility, and from the 17th century onwards equity was consolidated into a system of precedents much like common-law.

J. KINDS OF LAWS:

I. PRIVATE LAW AND PUBLIC LAW:

Public law:

1. Public law is a branch of law which determines and regulates the organization and functioning of the State(Nation).

2. It regulates the relation of the State with its subjects.

3. Public law includes (i) constitutional law, (ii) Administrative law (iii) criminal law, (iv) municipal law (v) international law;

4. Criminal law is enforced by the state.

Private law:

1. Private law is the branch of the law which regulates the relation of the citizens with one another.

2. The state, through its judicial organs, adjudicates the matters in dispute between the citizens.

3. It is primarily concerned with the rights and duties of individuals to each other.

4. Under the private law, the legal action is begun by the private citizens to establish rights against another citizens or a group of citizens.

5. Private law includes, (i) Law of contract (ii) Law of tort (iii) Law of property (iv) Law of succession, (v) family laws.

6. Private law is also referred to as civil law.

7. In private law, the role of the state is merely to recognize and enforce the relevant law.

II. General Law and Special Law:

According to **Salmond**, law may be divided into **two** parts. **General law and Special law**.

i. General Law:

General law consists of the general or ordinary law of the land. It is the law of the realm and does not require any special condition for its enforcement.

It is divided into **three** types.

a. Statutory Law:

This is otherwise called enacted law or legislation.

(Please refer Chapter No. 22, Page No. 163)

b. Law of Equity:

In England, the Court of Chancery was guided by the principles of equity.

Equity signifies natural justice, equality and fairness. Equity does not cover a wide jurisdiction. Equity does not include the whole of natural justice. Equity may be defined as a portion of natural justice for historical reasons not enforced by the common law Courts.

c. Common Law:

In England, in the Courts of Queen's Bench, common pleas were governed by the principles of common law. The term 'common law' means the **general law of England**.

However, the following laws **are not common laws**.

1. 'Common law' excludes the Statute law of England.
2. Case law arising out of the interpretation of Statutes is also not regarded as part of common law.

3. Special law is different from the general law of the land. Special law consists of legal rules which apply under special conditions or special circumstances.

4. In the words of Salmond, the common law is the residue of the general law of England, after excluding Statute law and Equity.

ii. Special Law:

Special law consists of legal rules which apply under special conditions or circumstances. They are special and exceptional in their nature, sources or

application. Hence it is treated outside the general and common law.

The main types of special laws outside the general law are of **ten** in number. They are as follows:

a. Local Law
b. Territorial Law
c. Personal Law
d. Conventional Law
e. Autonomous Law
f. Martial Law
g. Prize Law
h. Constitutional Law
i. International Law
j. Administrative Law
k. Foreign Law

a. Local Law:

Local law operates only in a particular portion of the State. It may be local customary law or local enacted law. Local customary law has its source in immemorial customs observed for an indefinite period in a particular locality.

Local enacted law, on the other hand, has its source in the local legislative authorities. E.g., Municipalities, Corporations, etc.

b. Territorial Law:

A territorial law is a **lex loci**. It applies to all persons living in the territory of the State irrespective of their personal status. The Law of Contracts, I.P.C., Cr.P.C., C.P.C. are examples of territorial laws.

c. Personal Law:

This law arises by custom, usage of people of a particular religion like Hindus, Muslims, Christians, Parsis and others.

For e.g., the Hindu law or the Mohamedan law is a system of personal law. It is a law of personal status and its applicability is dependent upon the person being a Hindu or a Mohamedan.

d. Conventional Law:

This law arises by **agreement between the parties**. The terms and conditions of the agreement bind the parties. Here the parties have voluntarily agreed to observe the law specified in the form of terms and conditions. E.g., Partnership agreements, Sale agreements, the Articles of Association in a Company etc.

e. Autonomous Law:

Autonomous law consists of law made by autonomous bodies. The autonomous bodies are large number of public utility Corporations outside the governmental system.

E.g., Election Commissions, Railways, Transport Corporations, Universities, etc. They have the power of making bye-laws for their self administration.

f. Martial Law:

Martial Law means the military law governing the armed forces at times of peace and war.It also means the power exercised by a Military Commander in occupation of a foreign territory.

It also means the suspension of ordinary law and the temporary government of a country by military tribunals in times of riot, rebellion, civil war or invasion and the aim is to put down violent oppositions for the execution of law.

Martial law is used for the suppression of ordinary law by military tribunals for the restoration of order and lawful authority. Martial law cannot be exercised in time of peace and it can only be administered at times of war.

When actual war is in progress, acts done by the military authorities are not justiciable by the ordinary Courts or tribunals. In other words, the legality of martial law and its proceedings cannot be questioned by Civil Courts.

g. Prize Law:

It is the Law of Nations (International Law) which is administered in the Prize Court of a State in

times of war. Prize Courts are municipal tribunals set up by the belligerent (enemy) States in their own territory or in territory under their military occupation.

The prize Courts are established for the purpose of deciding the validity of the captures made by their army.

The jurisdiction of a Prize Court extends to all captures made on the High Seas by its country's military men during war and the captures made on land by its naval forces and the ransoms and connected questions of damages. It also includes all recaptures.

The functions of Prize Courts are:

a. To enquire into cases of maritime capture.

b. If the property captured turns out to be out of lawful operation, then the decree of condemnation is passed against the persons who made the capture.

c. To award just restitution.

d. To protect the interest of all against disorder.

h. Constitutional Law:

(Please refer Chapter No. 18, Page No. 139)

i. International Law:

(Please refer Chapter No. 19, Page No. 142)

j. Administrative Law:

The following are the characteristics:

1. Administrative law determines as to who are the administrative authorities.

2. It decides the powers of administrative authorities.

3. It prescribes the limitation for the exercise of such powers.

4. It prescribes the ways by which administration can be controlled.

5. It prescribes the procedure to be followed by the administrative authorities.

6. It prescribes the remedies available to a person affected by administration.

The term 'administrative law' is technically known as **Droit Administratiff**, meaning administrative law as prevalent in France, which had the same characteristics as of modern Administrative Law.

The **difference between Constitutional Law and Administrative Law** is that the Constitutional Law deals with the structure, power and functions of all the three wings of Constitution namely legislative, administrative and judiciary whereas administrative law deals elaborately with administrative wing alone.

Foreign law:

Foreign law is law cited by a court that comes from outside country. other than the court which hears the case.

Foreign law is usually not binding on the court hearing it, and the citation to foreign law is only persuasive. Local courts play a role in determining the meaning of a foreign statute.

K. LAW MERCHANT (LEX MERCATORIA):

Law merchant, in modern times, is known as mercantile law/ commercial law.

In simple terms, Law merchant is the body of rules applied to commercial transactions. It is derived from the practices of traders rather than from jurisprudence.

Definition:

a) **Law Merchant** is defined as a system of customs acknowledged and taken notice of by all commercial nations. These customs constitute a part of the general law of the land. Their existence cannot be proved by witnesses, but the judges are bound to take notice of them.

b) Bouvier, A Dictionary of Law, 1856 defines Law merchant as body of rules for regulating the relations of merchants engaged in international trade. It was founded upon the customs of merchants.

Origin:

a) Law merchant originated in western Europe during the Middle Ages, and was subsequently recognized by the principal commercial nations.

b) It was at first administered by separate tribunals in the principal trading cities and later, it became part of the domestic law of the countries in which Law merchant flourished like the United States of America, United Kingdom and other European countries.

c) The Law merchant was not, like the common law, the custom of a place or territory. It was the recognized custom of merchants and traders. The merchant class and the controversies of its members arising out of commercial transactions were not subject to the common law.

During the sixteenth century, the admiralty court declared the principles of the law merchant. Later, the law merchant became laws merchant.

d) Law merchant became the basis of the modern system of admiralty laws and the Laws of Negotiable Instruments and the Sale of Good Act. It regulated the dealings of merchants and mariners in all the commercial countries of the civilized world.

It became the basis of the jurisprudence regulating bills of exchange and promissory notes, particularly the negotiability of such instruments, and the rights

and liabilities of persons becoming parties to the instrument.

L. DELEGATED LEGISLATION:

(Please refer Chapter No. 22, Page No. 163)

Sub Delegation:

It means transfer or transmission of power from a superior authority to it subordinates.

Sub delegation takes place when the rule making authority delegates further power to issue rules or directions either to its or some other subordinate agency.

Thus in sub delegation, a delegate further delegate his law making power and the legislations made under this power are called **'subordinate legislations'.**

Reasons for Sub-delegation:

1. The superior authority has to concentrate often on more important administrative functions.

2. The number of cases to be dealt are many that one single authority may not be able to cope up with all cases. So he authorizes a number of officers in the department to dispose of such matters.

Subordinate Justice:

This is administered by quasi-judicial authorities, who are generally executive authorities and who enforce

subordinate legislations. Subordinate justice is rendered through quasi judicial and administrative tribunals. The proceedings before the tribunals are summary in nature.

M. SPECIAL ACT VS. GENERAL ACT:

1. A Special Act may be altered, abrogated or repealed by a later General Act by an express provision.

2. A later General Act will override a prior Special Act if the two are inconsistent to each other.

3. Only if there is no inconsistency with General Act, the Special Act remains unaffected.

N. FUNCTIONS AND PURPOSES OF LAW:

The existence of law is very important for an orderly society. If there is no law, then a situation of 'anarchy' will start prevailing. Individual's whims and fancies will nominate.

There will be total violence, confusion and chaos everywhere. Muscle power, technological power and money power will start ruling the people. Injustice, arbitrary decisions can never be countered. It is, therefore, necessary to know the functions and purpose of law clearly.

Since law changes from time to time and place to place and with changes in society, the purpose and function of law cannot be precisely determined. Even then, the jurists have propounded the following functions and purposes of law.

1. Law maintains **law and order** in the society and this is the primary function of law. For any violation of law, there is the threat of punishment and by this process, law and order is maintained in the society.

2. Law ensures **freedom of an individual** in a community, but at the same time such freedom is not unfettered but must adjust with the freedom of other members of the community.

3. Law maintains an **orderly form of society**, where individuals feel secure.

4. The existence of law prevents **commission of offences** and through legal control, it realizes the **highest good** of the society.

5. Law ensures the **welfare of the people by disciplining their character and improving their morals**.

6. Law preserves **life, liberty, property and reputation** of individuals and society. It protects the present and future life.

7. Law secures **justice** to individuals and society.

8. By law, the **social benefits** and **social burdens are fairly distributed** among the members of the society. This is called **distributive justice**. If it is violated by anybody, it applies **corrective justice** and brings back the distributive justice.

9. Through procedural rules, law gives **equal opportunities** to both the parties of a dispute and thus prevents **judicial prejudices, bias and abuses**.

10. Law also helps to render justice **impartially** without fear.

11. The judgments are **fair** because law exists and judge's whims in the judgments are reduced.

12. Law also protects the **right to privacy**.

13. Law brings in **uniformity and certainty**, but at the same time it is flexible and changes with changes in society and thus it helps peaceful change of law from time to time. By this flexible process it achieves stability and peaceful life in society.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What is the difference between law, ethics and positive morality?*
2. *Explain the different kinds of laws.*
3. *Define law and discuss its purpose.*
4. *Write short notes on: (a) Question of law (b) Question of fact (c) Legal presumptions (d) Legal Fiction (e) Law and morality/ ethics (f) Presumptive proof*
5. *State the function and purpose of law.*

18. NATURE OF CONSTITUTIONAL LAW

SYNOPSIS:

A. ***Definition of Constitutional Law***

B. ***Nature of Constitutional Law - Austin's View and Salmond's View***

C. ***Constitutional law - matter of fact and matter of law***

A. DEFINITION OF CONSTITUTIONAL LAW:

Hibbert defines Constitutional Law as "the body of rules governing the relationship between the Sovereign and his subjects and the different parts of the Sovereign body".

Constitutional Law deals with the fundamentals governing the structure of the State, comprising of Executive, Legislature and Judiciary.

B. NATURE OF CONSTITUTIONAL LAW - AUSTIN'S VIEW AND SALMOND'S VIEW:

Regarding the nature of Constitutional Law, there are **three** views.

I. AUSTIN'S VIEW:

According to Austin, "Law is a command of the Sovereign" and the Sovereign himself is not bound by law, as one cannot be bound by one's own command. But Constitutional law controls the Sovereign.

Austin concludes that Constitutional law is not a positive law, but is merely a positive morality. It derives its force from public opinion, because of its expediency and morality.

Criticism:

Willoughby is of the opinion that Constitutional provisions do not bind the State, but the Government - the executive wing of the Constitution. So Austin is wrong to conclude that Constitutional law is only rules of positive morality.

II. SALMOND'S VIEW:

According to Salmond, "Law is the body of principles applied by the Court in the administration of justice". The Court may apply certain principles regarding the structure and functions of Sovereign power also. Thus Constitutional Law is a law according to Salmond.

Further, he criticises Austin's definition of law as defective, because it has excluded Constitutional Law from its ambit.

C. CONSTITUTIONAL LAW - MATTER OF FACT AND MATTER OF LAW:

According to Salmond, Constitutional structure namely the **'State'** must be existing before laws came into existence. So whether rules regarding the Constitutional structure is a law or merely a fact, has to be decided.

Salmond answers his own query as follows:

Constitutional structure first started as a fact. Thus it had extra legal origin or sometimes illegal origin like U.S.A. which was formed after rebellious American civil war of independence with the Parent State namely United Kingdom.

On this fact of a 'State', the principles of distribution of exercise of powers by the Sovereign started. These principles became to be known as Constitutional Law, when they were enforced by Courts of justice. Thus according to Salmond, Constitution is both a fact and a law and as 'fact', it is anterior to 'Law'.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss whether Constitutional Law is a true law or not.*
2. *Explain the nature of Constitutional law.*
3. *"The Constitution is both a matter of fact and a matter of law" - Salmond. Comment.*
4. *What do you mean by Constitutional law? How is it distinguished from ordinary legislation?*

★★★

19. NATURE OF INTERNATIONAL LAW
(TRUE LAW OR NOT)

SYNOPSIS:

A. Authority of Law

B. Nature and Definition of International Law

C. Status of International Law

Opinion-1. "International Law is no Law"

Opinion-2. "International Law is a Law"

D. Conclusion

A. AUTHORITY OF LAW:

A law to be recognised as a law must have binding force. The binding force to any law comes from the people who accept the Sovereignty of Parliament as a rule of law.

The authority of law comes if a rule involves a legal, moral or other kind of 'ought' (must) for the society. The society accepts some kind of legal system, when they feel it is morally desirable. Since the rule of Parliamentary Sovereignty involves a mixture of moral, legal and instrumental 'ought' propositions, it has the Authority of Law.

In the context, it is to be seen whether international law has an Authority of Law.

B. NATURE AND DEFINITION OF INTERNATIONAL LAW:

Even from the early stages of international law, there was much speculation about its juristic nature.

There were extreme views and sharply divided opinions on this controversial point. The controversy is due to the weakness of International law and also in the way of defining it.

International Law is defined as "the body of rules which by custom or treaty in civilised States regard as binding upon themselves in their relations with one another and whose violation gives the affected party a legal right to redress"- **Wheaton.**

C. STATUS OF INTERNATIONAL LAW:

I. INTERNATIONAL LAW IS NO LAW:

The leaders of this school are **Sir John Austin, Thomas Hobbs, Samuel Pufendorf, Bentham and others**. According to them, International law at best resembles rules of law. It comprises of only rules of positive morality. Even during the time of **Hugo Grotius**, International was termed as ***"No reality outside an empty name"***.

Sir John Austin defines law as the command of the Sovereign, issued to his subjects to follow a particular course of conduct, failing which they will be punished. Thus according to Austin, International law is not a law because it does not conform to his definition. He lays down the following reasons to support his conclusion.

The three essentials which constitute a law namely, **Sovereign, Command** and **Sanction** are missing in International law. There is no international Sovereign of determinate superior authority in International level.

There is no agency for enacting International Legislations. The International agreements are not the Commands of any Superior Authority. The auto-limitation, self-imposed by the Sovereign States upon themselves, is no limitation at all. Hence, International law is no law.

Further there is no organised force to enforce International Law. The International Court of justice is based on contentious jurisdiction and it lacks universal compulsory Jurisdiction. Thus, International Court of Justice has failed to act as an impartial third party.

Thomas Hobbs, Samuel Pufendorf and Bentham deny International Law as a true law. They give the following reasons:

1. International Law is a law between States and not above States. It is because of this reason, States do not respect International law. Rules of International Law have only moral and ethical validity. They have no legal validity.

2. The three wings of Municipal law namely - legislative, executive and judiciary are absent in International law.

3. International Law has not prevented the outbreak of the two world wars. It could utmost frame rules to regulate them.

4. International law is ignored while framing foreign policies of different nations.

Immanuel Kant remarks sarcastically, **"International law is eloquent in text books, but silent in the cabinets of diplomats"**. Thus, he affirms that International Law is not practically effective, though it is theoretically present.

Holland terms International Law as a **'Law by Courtesy'**. He emphatically denies the existence of International Law by stating **"International Law is the vanishing point of Jurisprudence"**.

Savigny terms International law as an **imperfect positive law.**

Salisbury quotes, **"the term International Law is misleading as there is no tribunal to enforce it"**.

H.A.A. Hark refutes by stating, **'International Law is a code of rules of moral conduct'**.

Pirate King denies the existence of International Law by exclaiming, **'A paradox ..... aparadox ..... a most ingenious paradox'**.

Several jurists criticise International Law, as merely a **slogan of diplomacy**.

In the judgement of ***Queen Vs. Keyn*** the Court observed, "strictly speaking, International law is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a law giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law given to

Sovereign States and no tribunal has the power to bind them by decrees or coerce them if they transgress".

An analysis of the arguments of the above said jurists show that International law is not a true law.

II. INTERNATIONAL LAW IS A LAW:

The leaders of this school are **Strake, Oppenheim, Holland, Laurance, Schewarzenberger, Brierly, Pollock and Sir Henry Maine.**

According to this school, International law is a law, a true law, but a different kind of law.

It cannot be declared untrue by comparing it with Municipal law, which is far advanced and well developed.

In King's case, the Court held that the existence of International Law was out of expediency and this was asserted by the following phrase.

'Nothing was unjust which was expedient (necessary)'.

Starke refutes Austin's conclusion by putting forth the following reasons:

Austin is incorrect in stating that there is no International Legislature. It may be true that there was no International Legislature during Austin's times, but at present, treaties and conventions have become important sources of International Law.

Austin is again incorrect, when he states that sanction is the force behind the law. The Historical Jurisprudence has proved that symptoms of law which have no formal legislative authority are also equally obeyed by States and enforced by U.N.O.

Impartial third party is present in the modern International Law. The past and present conferences act as Legislatures.

The Council in the League of Nations, the Security Council in the United Nations Organisation act as **executives**.

The Alabama Arbitration, the permanent Court of Arbitration, the Hague Convention 1899, 1907, the Permanent Court of International Justice, and Adhoc Arbitration Tribunal act as **justicial bodies**.

The argument that there is no respect for International law is not valid. **Morjanthan** says that almost all the awards of International Tribunals are obeyed by the parties to the disputes.

There are frequent breaches in the Municipal law, but still Municipal law is valued as a true law. Thus, breach of International Law does not make it untrue.

The argument that International Law could not prevent the outbreak of war is also untrue. War falls within the Municipal law also. Declaring war is one of

the highest acts of Sovereignty. The true function of International Law is only to regulate the conduct of war.

The United Nations permit recourse to war for self defence and on the basis of collective security. Just because there is no rule in International Law to prevent war, it does not mean that International Law is not a true law.

In framing foreign policies, the rules of International Law are very often followed. Highly qualified experts are employed by States to guide the Government on various problems of International Law and framing foreign policies.

Professor Oppenheim defines law as a body of rules for human conduct within a community which by the common consent of the community shall be enforced.

International law satisfies the definition of law of Oppenheim. The present world exists as a community of nations. The rules of conduct have grown up by customs, law making treaties and conventions.

There is the existence of common consent of the community of States for the enforcement of the rules of International Conduct.

Thus International Law satisfies the three essentials of Oppenheim's definition of law namely - **a Community, a body of rules for human conduct and**

consent of the community for the enforcement of the rules.

Schwarzenberger states that International Law resembles municipal law in **three** ways namely:

1. Law of power

2. Law of reciprocity

3. Law of co-ordination

The International law acts as a true law just like Municipal law.

Holland and Lawrence say that International law is derived from custom, precedent and conventions like any other positive law and hence it is a true law.

In **Charming Betsy case**, **Mothi O.J.** declared "an act of Congress ought never to be construed to violate the law of nations if any of the possible construction remains".

In the **Paquette Habana Case (1900) Gray J.** held "International law is part of our law and must be asserted and administered by the Court of Justice of appropriate jurisdiction as often, as questions of right depending upon it are duly presented for their determination".

The **State Practice** also confirms the true nature of International law. The Constitution of almost all

nations approve the existence of International law and declare it as part of the Law of the Land.

The **International documents** enacted by the Hague conventions, the League of Nations, the U.N.O. and the O.A.U. (Organisation of African Unity) are based on the rule that International Law regulates the relations of member States.

Article 28 of Statute of International Court of Justice enjoins on the Court to resolve international disputes by applying International law.

The codification of International law by the **Hague Codification Conference** recognised International law as a true law. The counter argument by the second school disproves the first school's argument.

D. CONCLUSION:

The theoretical views by Eminent Jurists, the State Practice by different nations and the judicial decisions affirm the legal character of International Law.

Therefore, International law is undoubtedly a true law. State Law is well organised and it controls only smaller community of individuals whereas International Law is unorganised and covers wider community for Independent States.

It is still in the formative stage. So it is bound to be weak. Its weakness does not make it untrue.

International Law has a weak sanction as according to **J. Loder**. It has no organised force to punish breaching nations and individuals.

In Lotus case, it was held that International law is mostly unwritten .The pace of codification is very slow and it is also mainly customary. Many of the rules of International law are quite uncertain.

In the fast developing world federation, International Law is not able to cope up with the requirements of the world.

The International Legislative machinery is inadequate and so the development of International law is rather slow.

The main weakness of International Law is that it is not authorised to intervene within the domestic jurisdiction of States even in the economic relations.

This is quite evident from the weak attitude of the U.N.O towards the white regime in South Africa and Rhodesia.

The States are often reluctant to submit themselves to the rules of International Law. This is a hindrance for the growth of International law.

The reluctance of States is due to excessive nationalism, power politics and highly self-centered attitude of States.

Though International Court of Justice acts as an impartial body, it has no compulsory universal jurisdiction for settling legal disputes among States.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Is International law a true law or is it simply International morality?*
2. *"International Law - is the vanishing point of Jurisprudence" Holland - Comment.*
3. *"International Law is eloquent in text books but silent in the cabinets of diplomats" Immanuel Kant. Comment.*
4. *"International law is the code of the rules of moral conduct"-H.A.A Hark Discuss critically.*
5. *International Law.....a paradox .....a paradox.....a most ingenious paradox"-Pirate King. Discuss giving reasons.*
6. *Explain the theory of Sovereignty with special reference to International Law.*
7. *Is International law a law as per Austin's theory of Sovereignty?*

20. DIFFERENCE BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. International Law is the law of nations, regulating the relations between the member States of the family of nations.

   Municipal Law is the law of State regulating the conduct of individuals and deal with the relation between individuals and the State.

2. International Law is concerned mainly with foreign affairs or inter-state affairs.

   Municipal Law is concerned with intra-state affairs and domestic affairs.

3. International Law is based on consent and consensus of nations(states)

   Municipal Law is based on the command of the sovereign andsanction for disobeying of command.

4. International Law is the common will of the States.

   Municipal is the will of a Sate empowered by sovereign authority.

5. From the positivist point of view, International is considered as a weak law (because of weak sanctions) in comparison to Municipal Law (because of strong sanctions)

6. Treaties, conventions, international customs, general principles of law recognised by civilised

nations are the primary sources of International Law.

Legislation, Precedent and customs are the sources of Municipal Law.

7. In International Law, the International Court of Justice acts as judiciary, and its decisions are binding upon the parties to the litigation who have submitted themselves to the jurisdiction of the International Court of Justice.

In Municipal Law, courts are all pervasive and binding.

8. International treaties, conventions, the decisions of International court of justice etc., are not directly enforceable within domestic jurisdictions of states unless they are specifically incorporated in the Municipal laws of a state by enacting suitable legislations in state level.

Law laid down by the sovereign States for its enforcement.

9. States are the main subjects of international law, whereas individuals are the subjects of Municipal laws.

10. United Nations Organisation acts as an inter national legislative body in international law. Parliament acts as the legislative body in Municipal law.

SOURCES OF LAW

There are three important sources of law namely:

1. CUSTOM
2. LEGISLATION
3. PRECEDENT

These three sources of law have been separately dealt with under the following chapters.

21. CUSTOM AS A SOURCE OF LAW

(HISTORICAL MATERIALS)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction
B. Custom - a source of law
C. Kinds of customs
D. Conditions for local / general custom to become law (Essentials of valid custom)
E. Theories of customary law
F. Difference between custom and prescription
G. Conclusion

A. INTRODUCTION:

Custom is a rule of action, voluntarily and uniformly followed by the people. In ancient times, customs formed law. Law was deemed to lie in the general customs of the community.

B. CUSTOM - A SOURCE OF LAW:

1. ***"Viv trita viv tuta"*** meaning that **frequented path is always a reliable path.**

2. Custom is to Society, what Law is to State. In ancient days, custom was the only source for administration of justice. Many laws now enforced existed as custom in ancient days.

3. Long continued custom is often rational. Social institutions have to make the national expectation of people as law.

C. KINDS OF CUSTOMS:

1. CONVENTIONAL CUSTOMS:

The custom arose out of contract. Parties to a contract generally used certain terms to be observed in their transactions. The Sale of Goods Act, Partnership Act, Law of Agency, etc., were based on the conventional customs.

2. PERSONAL CUSTOMS:

It relates only to a few individuals and it does not involve the people in general. For e.g., Easementary right is out of a personal custom.

3. LOCAL CUSTOMS:

Local custom is itself of **two** types:

a. Local custom b. General custom

a. Local custom:

The local custom prevails in some defined locality only, such as a village, tribal areas, particular localities of town and cities. It constitutes a source of law for that particular place only.

At present, the local customs consists of customary rights practised by the inhabitants of a particular place. It is generally of marriage, ceremonies, land cultivation, usage of rivers, private onwership, etc.

For a local custom to become a source of law, it must conform to the following requirements laid down by law.

b. General Custom:

It is observed throughout the State. It is part of the common law of the land. It prevails throughout the country. It constitutes as a main source of the common law of the land.

D. CONDITIONS FOR LOCAL/GENERAL CUSTOM TO BECOME LAW: (ESSENTIALS OF LEGAL CUSTOM)

All customs do not become law. Only valid customs have the force of law.

The following essentials should be fulfilled by a local/general custom to be recognised as law.

1. REASONABLENESS:

The custom must be reasonable. It should not affect the society in any way. It should satisfy the

principles of natural justice. If a custom is unreasonable, then it is not valid and will not become a law. For e.g., if a custom recognises that a woman can marry more than one man, it is unreasonable and hence invalid.

2. Conformity:

The custom should be in conformity with the established Law of the Land. If a custom is inconsistent with the Law of the Land, then it is invalid. For e.g., slavery is an offence under the I.P.C. If a custom recognises slavery, then such a custom is invalid. Custom cannot remove the force of an Act of Parliament.

3. Opinion:

The public must think that the custom is beneficial for them. They must value such customs as the binding rule of the community and not of individual choice.

4. Observance:

A mere practice of custom will not become law. It must be observed freely and voluntarily as of right. It must not be forced on the persons who follow it.

5. Immemorial Antiquity (Trace origin of custom):

The origin of the custom should be from time immemorial. The origin should not be traceable. No living man must remember its origin. Recent customs or modern customs are not valid customs.

Fashion is not a custom. In England, a custom to be valid must have existed continuously from 1189 A.D. If a

custom has not been existing at any time between 1189 upto date, it is not valid.

6. CONTINUITY:

The custom should be followed without interruption. It must be followed continuously.

7. PEACEFULNESS:

The custom must have been peacefully observed. In other words, it should not be protested in any way.

8. CERTAINTY:

The custom must be certain and definite. It should not be vague. If a custom is indefinite, then it is invalid.

9. CONSISTENT WITH OTHER CUSTOMS:

A custom should not be opposed to other customs. If two different customs exist which are inconsistent to each other, then both the customs are invalid.

R Vs. Karson:

There was a custom allowing women to desert their husbands and marry again without their husband's consent. Such custom had immemorial antiquity. But it was held void because it was unreasonable and opposed to morality.

E. THEORIES OF CUSTOMARY LAW:

There are two conflicting theories to find out at what particular stage, custom becomes law.

1. Analytical School Theory:

Austin says that custom becomes law only after it is incorporated in legislation or when it is recognised and enforced by Court. This view is as per 'Sovereign Theory of Austin'.

2. Historical School Theory:

Savigny, Henry Maine, Holland and others advocate this theory. According to this theory, custom is a **law by itself**. It does not require the State recognition to becomes a law. Because of some deep rooted need of the people, a custom was followed and so the justification that it is a law by itself is correct.

Custom is self sufficient and independent of Legislative Authority. It is a condition precedent to all sound legislations. Custom grows by conduct and it is a mistake to measure its validity by express sanction of Court or Legislation.

F. DIFFERENCE BETWEEN CUSTOM AND PRESCRIPTION:

Prescription means the creation or destruction of rights by lapse of time. It has two effects. If the lapse of time creates a right, then it is called **positive prescription**. If the lapse of time destroys a right, then it is called **negative prescription**.

Long possession creates rights. For e.g., if a person adversely possesses a land against its owner for **twelve years**, then he becomes the real owner.

The differences between custom and prescription are as follows:

1. Custom is a course of conduct and it obtains the force of law by long usage.

   Prescription is acquisition of a right or title by long use or long possession in a legal manner.

2. Custom must be reasonable and conform to public policy etc., but no such conditions prescribed for prescriptions.

3. Custom is a source of law whereas prescription is a source of right.

4. Custom is based on long usage whereas prescription is based on lost grant.

5. Local custom relates to a particular locality whereas prescription applies to persons.

6. Custom must be ancient and there is no time limit. However, for a valid prescription, its access and use must have been asserted and enjoyed peacefully without interruption for **twenty years**.

G. CONCLUSION:

In order to recognise a custom as valid, all the above essentials should be fulfilled. Even the breach of one essential may render the custom invalid. Thus custom is a source of law influencing the development of legal system.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *a) Discuss the importance of Custom as a source of law.*

   b) Mention the requirements laid down by law for local custom to serve as a source of law.
2. *What conditions should a custom satisfy before Courts of law recognise it? What is the object in insisting on these conditions?*
3. *Enumerate the various sources of law giving illustrations*
4. *When does custom become law?*

22. LEGISLATION AS A SOURCE OF LAW

(INTERPRETATION OF STATUTES)(RULES) (LEGAL MATERIAL)(KINDS OF LEGISLATION) (LITERA LEGIS, SENTENTIAL LEGIS) (ADVANTAGES AND DISADVANTAGES OF LEGISLATION)

(MOST IMPORTANT)

SYNOPSIS:

A. *Introduction*
B. *Types of Legislation*
C. *Difference between Primary legislations and Secondary legislations*
C. *Delegated Legislation*
D. *Advantages of Legislation over Precedent*
E. *Advantages of Precedent over Legislation*
F. *Interpretation of Statutes*
G. *Rules of Interpretation*

A. INTRODUCTION:

Legislation is one of the most important sources of law. Etymologically, legislation means **making, putting or setting the law**.

Salmond defines legislation as that source of law which consists in the declaration of legal rules by a competent authority. This definition is the strict and most usual application of the term 'Legislation'.

In a wide sense, it is used to include all methods of law making. Thus legislation means **making new law**

in any fashion and it includes adding or altering the law by all the sources of law.

In practice, strict definition is used and it means enactment of law by competent authority namely Legislature or Parliament. Thus legislation means enactment of laws. The enactment of laws by Legislature or Parliament is called **Direct Legislation.**

B. TYPES OF LEGISLATION:

Legislation is divided into **two** types:

1. Supreme Legislation

2. Subordinate Legislation (Indirect Legislation)

1. SUPREME LEGISLATION:

Supreme Legislation proceeds from the Supreme or Sovereign power in the State. It cannot be repealed, annulled or controlled by any other Legislative Authority.

This is also called **"Primary Legislation".**

Primary legislation is law made by the legislative branch of government. There are two types of primary legislations. Public General Acts - There are many new Public Acts enacted each year.

Most of the Public General Acts are accompanied by Explanatory Notes, which explain in clear English what the Act sets out to achieve and place its effect in context. Local and Personal Acts - These Acts affect a particular locality, person or body.

2. Subordinate Legislation (Indirect Legislation):

In India, all laws made by the authorities other than Parliament and State legislatures are Subordinate Legislation. As they receive their power from Parliament, they are subject to the control of Sovereign Legislature.

This is also called **Secondary Legislation.**

Secondary legislations are Statutory Instruments, which are often called Codes, Orders, Regulations, Rules. They are generally made by Goverment Ministers under under powers delegated by Parliament.

They are also called Delegated legislations or Executive legislation or Subordinate, Subsidiary legislations. Secondary legislation must be authorized by primary legislation, and conform to boundaries it has laid down.

There are **Six** forms of Subordinate legislation. They are:

i. Colonial Legislation:

It is the ownership entrusted to Colonies and other dependencies by Parent State. A Colonial Legislature can further delegate its powers to other bodies that are dependent upon it. E.g.: England made laws for India before 1947.

ii. Executive Legislation:

Certain legislative powers are delegated expressly to the Executive by the Parliament. Statutes entrust the duty of supplementing the statutory provisions by

issue of more detailed regulations to executives authorising them to make sub rules under them.

iii. Judicial Legislation:

The Superior Courts have the powers to make rules for regulation of their own procedure. This is called Judicial Legislation.

iv. Municipal Legislation:

Municipalities have power to establish Special Laws for the Districts or areas under their control. Such enactments are called **Bye-laws**.

v. Autonomous Legislation:

Generally law making is done by the State only, but in certain exceptional cases, it is necessary to be entrusted to private hands. So limited legislative authority is given to groups of private individuals to make by-laws in matter concerning themselves.

E.g.: Railway company makes by law for the regulation of its undertaking, University, Registered Company etc., Thus legislation by such private persons is called Autonomous Legislation.

vi. Quasi legislations:

1. These legislations include a broad category of legislations and are difficult to classify.

2. It includes Government Circulars, Rule Books and Codes (for Eg., Codes of Practice under Police and Highway Code etc).

C. DIFFERENCE BETWEEN PRIMARY LEGISLATIONS AND SECONDARY LEGISLATIONS:

1. Primary legislations are laws made by the legislative branch of government, whereas Secondary legislations are usually framed by the executive wing of the Constitution.

2. Primary legislation is a general term for all the enactments passed by Parliament to become law.

Secondary legislation refers to the body of rules and legislation which are subsequently set in place by government departments authorised to do so by Parliament on the basis of the primary legislation.

This system ensures that Parliament can get through its business without having to concern itself with the small practical details of legislation.

D. DELEGATED LEGISLATION:

Under the provisions of laws passed by the Legislature, the executive authorities are empowered to make rules and regulations and such legislations made by the executive authorities are called Delegated Legislations.

Delegated Legislation is necessary for the following **four** reasons:

1. The Legislature has no time to enact detailed laws. So, it enacts only the "Skeleton" laws and the flesh and blood are left to be supplemented by the executive authorities.

2. Certain technical matters can be better handled only by experts. In such cases, the Legislature makes only bare provisions of law and the detailed rules are made by experts.

3. As the legislative procedure is very lengthy, it may not be possible in times of urgency or emergency. During such situations, the legislature only gives the broad outlines of law and the rest is done by the Executive.

4. Quick changes in laws cannot be easily made due to lengthy procedure involved in legislations. However based on the public reaction to the laws, quick changes in laws are to be made in experimentation basis. Such experimental law can be made by the Executive with more ease and speed.

C ntrol of delegated legislation:

To avoid the misuse of delegated legislation by the executives, the Parliament/Judiciary have devised control measures which are as follows:

1. Parliament always has the control and it may modify, amend or repeal the powers of the Minister or any subordinate authority.

2. Laws made under the Delegated Legislation should be laid before the Legislature for approval and the Legislature may amend or repeal these laws, if needed.

3. The Courts have indirect control. Courts cannot actually annul the subordinate enactments but can declare them as 'not applicable' in particular circumstances of a case.

4. The Courts also have certain direct powers over the acts and procedures of the Executive Authorities. The most important control of executive actions is by way of **Writs**.

5. Internal control of delegated legislation can be ensured if the power is delegated only to a trust - worthy person or body of persons.

6. Public opinion is also a proper check on the arbitrary exercise of delegated powers by the executive authorities.

E. ADVANTAGES OF LEGISLATION OVER PRECEDENT:

1. CONSTITUTIVE AND ABROGATIVE:

Legislation is both constitutive and abrogative. It can enact (constitute) new laws, increase the provisions of the existing laws, amend or annul (abrogate) the existing laws.

On the other hand, Precedent is only constitutive, that too, limited in scope. It can create a new law, only when the new law is not in conflict with the old law. If the old law is already a settled law, then it has to be followed and it cannot be brushed aside by the Court.

Here only by a legislation, such a settled law can be effectively altered and in this context, Legislation is superior to Precedent.

2. Division of labour:

In legislation, there is division of labour while enacting laws. Legislation is concerned only with the law making process and it leaves the enforcement function to the executive.

Because of a single function of only enacting laws, there is increased efficiency in Legislation. Further before a bill becomes a law, there is wide discussion, publicity, criticism by public etc. So legislation is a fine product of law.Precedent, on the other hand, creates law and also administers law. Thus it combines these two functions. So there is less efficiency in Precedents.

3. Certainty:

Legislation is certain, because it is codified. Whereas precedents are dependent on cases involving question of law to come before the Court for decisions and only then, a new law comes into existence. Thus precedent is uncertain.

4. Known in advance:

In Legislation, before the law is enforced by law Courts, it is made known to the public in advance by notification in the Official Gazette, paper publications etc. Thus the principle of natural justice that law must be known before a case is decided by a Court is satisfied by Legislation.

Whereas in precedent, law is known only after the judgment is delivered and hence there is no possibility of knowing the new law made by the Court.

Thus precedent does not comply with the principle of natural justice that the law must be known before the case is decided.

5. PROSPECTIVE OPERATION:

Legislation is operative prospectively, i.e., law is first enacted and published and in that law, disputes are brought before the Court which decides on the basis of the enacted law. Thus the application of legislation is for future cases only and very rarely for past cases.

In Precedent, on the other hand, the case law made by the Court after judgment applies to the facts of the case retrospectively. In other words, the facts of the case are heard by the Court and to such facts, the new case law decided in the judgment is applied.

6. PRECISE AND CLEAR:

The words and sentences in legislation are precise, clear and easily understandable. Further it is easily available in the form of bare Acts.

The Acts are precise, accurate and clear and presented in the form of paragraphs and numbered serially as sections and sub-sections, etc. Thus the legislation is superior in substance, form and standard.

Whereas precedent is contained in the judgment of Courts. The judgments are lengthy, legally worded and difficult to understand by a common man. The 'ratio decidendi' in precedents has to be searched and found out.

7. Anticipation of future cases:

Legislation can make rules in advance in anticipation of future cases that may arise at a later date.

But in precedent, the Court has to wait for the occurrence of some dispute and the parties to file the case before it. Only then, it can make a new law. If the parties do not file any case, then no new law can be made by way of precedent.

8. Rectification of defects:

In Legislation, if there is any defect it can be rectified by amendment, once it is brought to the notice of the Legislature. But in precedent, this is not possible. Even if a Judge notices a defect in a law, he cannot 'suo moto' correct such defect.

He has to wait for a case to be filed in his Court and only then, he can correct such mistakes. Therefore Precedent is incomplete and unsystematic. The process of extracting the law from decided cases is difficult and can be done only by professionally trained persons.

The common people cannot understand them. But a statute law is easy to understand. Judiciary law in numerous law reports is not easily accessible but statutory law is contained in specific enactments.

E. ADVANTAGES OF PRECEDENT OVER LEGISLATION:

1. Better Law:

Judge made laws (Precedent) are better adopted to render justice since the judgments are written with

greater logical consistency. Further the Judges are trained persons in law and also in administration of justice. The Judges are specially trained in writing fair judgments.

Further the morality of the judges is higher than the morality of politicians. Thus judicial law (Precedent) is a qualitive product and more equitable than Statutory law (Legislation).

Legislation is made by politicians who are not legally trained persons. Further while enacting law, apart from rendering justice, many other considerations are also looked into and hence the legislation is not a fine product of law.

2. FLEXIBILITY:

Precedent is flexible. One of the main advantages of a precedent is its greater flexibility. The Court does not confine itself only to the letters and sentences of the legal provisions, but it goes deep into the true meaning and spirit of the provisions and applies the same in deciding a case and in this context, the precedent is highly flexible.

Whereas Statutory law (Legislation) is rigid and not flexible at all. Rigidity is the capital defect of Statute law. The letters and sentences in the enactments are the basis for enforcement of law by the executive authorities.

They do not go beyond the letter of law, but apply the law mechanically and in the process, justice is often denied to the parties.

3. Precedent - Practical and Scientific:

The case law (Precedent) is closely related to the facts of the case. Depending on the facts of the case, the judgments vary. The Precedents control the arbitrary powers of the Judges as they are forced to follow the 'ratio decidendi' of earlier judgments for similar facts of the case. In this context, precedent is scientific and practical.

F. INTERPRETATION OF STATUTES:

Generally, the law is clear (Litera Scripta). It is applied as it is (no interpretation is given and the literal meaning is taken). But laws are not always certain and definite. In such cases, interpretation is necessary. Interpretation means ascertaining the real meaning of the legislations (Acts and Codes).

Interpretation is divided into **three** types:

1. Literal Interpretation (Litera Legis) or Grammatical interpretation or Golden rule of interpretation.
2. Logical Interpretation (Sententia Legis).
3. Equitable Interpretation.

1. Literal Interpretation (Litera Legis) or Grammatical interpretation (Golden rule of Interpretation):

By this, we mean that the literal meaning of the words should be taken in deciding the case. It consists of the words, sentences and letters of the particular provision of law and takes the dictionary or popular meaning for them. The literal interpretation is ordinarily

used to decide a case. Also statutory words are interpreted by means of their definitions and judicial decisions.

In interpretation of wills or other instruments, literal interpretation is followed, unless it is absurd or inconsistent with the other parts of the instrument.

2. Logical Interpretation (Sententia Legis):

When the law is uncertain and indefinite, the real intention of the law maker should be found out. For that, the judges apply the logical interpretation. It is applied only under necessary circumstances and so it is narrow in its scope.

Legislature must be deemed to have meant what is said and said what is meant. The logical interpretation is applied only when logical defects are present.

The following are the **three** instances of Logical Interpretation:

a. Ambiguity b. Inconsistency c. Lacunae

a. Ambiguity:

When the wording of an Act gives more than one meaning, then ambiguity arises. The judges will look into the case and take the correct meaning for the 'wording' to decide the case. Ambiguity may be **semantic or syntactic**.

Semantic defect gives rise to confusion regarding the meaning to the Statute. One word may mean two or more different things. Syntactic ambiguity arises due to confusion in meaning of formal words like "or", "all", "and" etc. In such cases of defects, the Court shall resort to logical interpretation.

b. Inconsistency:

When one section is contradictory to another section, then inconsistency arises. The judges have to decide which section will prevail over another in a particular case. They will apply such Section to decide it.

For e.g., Article 20(3) of the Indian Constitution and Sec. 27 of Indian Evidence Act are contradictory to each other. In this case, the Supreme Court held that Indian Evidence Act will prevail over the Indian Constitution.

c. Lacunae:

These are the omissions in the Act. Because of the omission, literal interpretation is not possible. The Court will fill up the gap or omission by equitable interpretation.

3. EQUITABLE INTERPRETATION:

It is not a third kind of interpretation. It is a kind of logical interpretation. ***In Nisbet Vs. Fayne & Burn***, the husband of Nisbet was a cashier in the department firm of coal mines. He used to carry cash once in every week to disburse the wages of the miners.

On one such occasion, he was waylaid, robbed and murdered. Nisbet (widow) filed a suit for compensation under Sec. 1 of the Workman's Compensation Act, 1905. Sec. 1 of the Act provides compensation for injuries due to accident "in the course of employment".

The defendants contended that the death in this case was not due to accident but due to murder and therefore the plaintiff was not entitled to compensation but the judge interpreted "accident in the course of employment" to include death by murder also, in the course of employment.

In this case, the intention of legislature was fulfilled by resorting to equitable interpretation. In English Jurisprudence, the **Golden rule of interpretation is only literal interpretation**. In all cases where there is one defect or uncertainty, the grammatical or literal interpretation of the words should be given.

(But in America this is not a Golden rule and the Courts can adopt the logical interpretation even in respect of the ethical defects of the Statute and even if the words in the Statute are clear and definite).

G. RULES OF INTERPRETATION:

1. RULE IN HEYDON'S CASE: (MISCHIEF RULE)

When the intention of the legislature is not possible of ascertainment due to repugnancy between one Section and another, the Courts can discover the

intention of the legislature by taking into consideration the circumstances attending the enactment. The power of the Court is limited to **three** circumstances only, as follows:

i. The law as it stood before the Statute was passed.

ii. The evil in the old law which had to be cured.

iii. The remedies provided by the legislature in the new enactment to cure the evil.

This is called the "mischief-rule" of "the rule in Heydon's case".

2. Rule of Ejusdem Generis:

When particular words are followed by general words, the general words must be deemed to mean the same species as the particular words.

When referring to perishable article transported by Railway, the Act may enumerate a few perishable articles like fruits, vegetables and such other articles.

The words 'such other articles' would include only perishable goods and not non-perishable articles like wood, steel, etc.

3. Rule of Causus Omissus:

In grammatical interpretation, the omission in the enactment cannot be filled up by interpretation. In

Logical interpretation, Courts have the power to remedy the defects of both litera legis and sententia legis, but ethical defects cannot be cured by interpretation.

In ***Parkinson Vs. Plumpton,*** the rule in causus omissus has been enunciated under the Catering Wages Act. Wages were fixed for those workers provided with free boarding and lodging and for those provided with neither.

No wages were fixed for those who were provided only with boarding or only with lodging.

A certain worker who was provided with boarding but not lodging was denied the wages applicable to the category of workers not provided with boarding and lodging.

The judge considered that the omission to provide for such a category of workers was an ethical defect, the rectification of which was beyond the powers of the Court. However the Court decided in favour of the worker.

4. Doctrine of Prospective Overruling:

In the case of ***Golaknath Vs. State of Punjab***, the Supreme Court applied this doctrine for the first time. It was said that judgement in Golaknath case would have prospective effect only and it would not affect the past amendment passed by the Parliament infringing fundamental rights.

The judgement was declared on 27th February 1967, and hence it would take affect only from that period and would not effect the prior amendments.

Thus the past amendments infringing the fundamental rights like the first, fourth and seventeenth amendments would continue to be valid.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain how legislation is a source of law.*
2. *Elucidate the meaning of legislation in its 'widest' and in its 'strict' sense. Distinguish Supreme Legislation and Subordinate Legislation.*
3. *Discuss the relative advantages and disadvantages of legislation and precedent.*
4. *Explain the principal rules of Interpretation of statutes.*
5. *Compare and contrast legislation and precedent as sources of law.*
6. *In the case of enacted law, the process of judicial interpretation assumes greater importance – Explain.*
7. *Write short notes on: (a) Golden rule of interpretation (b) 'Sententia legis' (c) Equitable Interpretation (d) 'Ejusdem Generis' (e) Rule of 'Cassus Ommissus'*

23. CODIFICATION (CODIFYING STATUTE) AND CONSOLIDATION OF LAW

I. CODIFICATION (CODIFYING STATUTE)

Codification means the systematic arrangement of whole law of any particular branch of law to prese it in the form of principles and rules.

In simple terms, it is putting the verbal laws in a written form. It includes collection, compilation, systematic arrangement of laws. It declares certain new rules in a clear and precise form. It also consolidates the common law, case law and statute law in a particular form. It acts as means to guide judges to act according to the 'clear laid down law'.

I. ADVANTAGES:

1. It makes law certain.

2. It harmonises different rules into a consolidated and unified law.

3. It also makes the law coherent and comprehensive.

4. It makes laws easily accessible to every body who desire to know it.

5. It helps to improve the administration of justice.

6. It also makes law stable.

II. DISADVANTAGES:

1. By codification, law becomes rigid and loses its flexibility to adopt itself to the varying circumstances.

2. By codification, the growth of law is curtailed and it becomes stagnant.

3. No code can be self sufficient, as many new problems may crop up day by day.

4. The law breakers can misuse the wordings in codification by giving different interpretations.

5. Codification gives too much of importance to the technicality of wordings rather than the true meaning of law.

II. CONSOLIDATION OF LAW

SYNOPSIS:

A. Introduction

B. Requirements for Consolidation of law

C. Steps for consolidation of law

C. Parliamentary procedure for enactment of consolidation of Law

E. Documents submitted to Parliament in support of a Consolidation Bill

A. INTRODUCTION:

The main purpose of consolidation of law is to bring together different enactments on a topic and make them into a single Act. The Act usually replaces provisions in different enactments on the subject passed over a period of years.

The structure of the original law would often have become distorted over a period of time and so it requires reformation of the entire or major legal materials available in pieces and make them into a single intelligible piece of legislation.

The consolidation of law enables to remove obsolete and outdated materials. It modernises the orthodox language used and it also resolves many of the minor inconsistencies and ambiguities that has crept in over the years.

B. REQUIREMENTS FOR CONSOLIDATION OF LAW:

1. While making consolidation of law, the changes considered should not affect other existing legislations and at the same time, it reproduces accurately the effect of all current laws.

2. Consolidation of law is exceptionally difficult. The drafter of consolidation of law/s must be confident that a restructured or reworded text reflects the true effect of the changed law. However, such changes should have been permitted by the parliamentary procedure.

3. Substantive changes to the law are often required in order to produce a satisfactory consolidation of law.

4. If consolation of law cannot be made under a specific procedure, they have to be made by an ordinary procedure for enacting a new legislation.

C. STEPS FOR CONSOLIDATION OF LAW:

1. The Senior Parliamentary Counsel in the Law Commission considers the proposal for consolidation of law by assessing whether the law is suitable for consolidation.

2. Before taking the pieces of legislations for consolidation, the time duration, financial resources and manpower needed for it are assessed by the Law Commission as larger consolidation of law can easily take many years for completion.

3. The Senior Parliamentary Counsel must establish the strong reasons and pressing need for consolidation of law.

4. The Law Commission considers all risks affecting the chances of successful completion of Consolidation of law before taking a project for consolidation.

5. The Law department's views, comments on Consolidation of law, including the issues which may arise in future are also seriously considered by the Law Commission.

6. The law department should provide sufficient practical support to the successful completion of Consolidation of law project'.

D. PARLIAMENTARY PROCEDURE FOR ENACTMENT OF CONSOLIDATION OF LAW:

1. The Law Commissions and the Parliament have established a special parliamentary procedure for enactment of consolidation of law Bill. This enables the Bill to be debated and scrutinised on a non partisan basis.

2. The main parliamentary stage is the detailed consideration of the Bill by the Joint Committee on Consolidation etc Bills. If the Joint Committee is content with the Bill the other parliamentary stages are largely formal.

3. The procedure cannot be used for a Bill that alters the substantive effect of the prior law before consolidation, unless such changes are recommended by the Law Commission. The purpose of any such change must be to produce a satisfactory and acceptable consolidated text.

4. Changes recommended by the Law Commissions need to be approved by the Parliament.

E. DOCUMENTS SUBMITTED TO PARLIAMENT IN SUPPORT OF A CONSOLIDATION BILL:

The following documents are made available to Parliament, when it is considering a Consolidation Bill:

1. **Drafters' Notes to the Joint Committee:** These notes provide the Joint Committee with the background to the project. They describe things that the drafter has done in consolidating the law. They identify the more significant issues that have required the drafter to make a decision as to the best way of reproducing the consolidation law.

2. **Table of Origins (previously known as a Table of Derivations)**: This states where from the provisions of the Bill have come to the legislation which is being consolidated. Any text that does not originate from the provisions repealed by the Bill are also indicated, such as Commission recommendations, Reference textbooks etc.,

3. **Table of Destinations:** This sets out where the repealed provisions have ended up in the Bill. It also identifies the existing text that is not reproduced in the Bill with a brief reason for non inclusion.

4. The 'Law Commission Report' relating to the Bill is also submitted to the Parliament, in case If there are any recommendations by the Law Commission for changes to the law being consolidated.

Consolidation of law is essential to unify different related law/s which were till then scattered in pieces. The consolidated legislation helps the lawyers and the public to understand easily what the entire law is on a particular topic/subject. Further, since such consolidated law has been updated with necessary

additions/deletions, it satisfies the changing needs and requirements of society and in this context, the law is pragmatic.

UNIVERSITY QUESTIONS FOR REVIEW :

1. *Explain Codification and its Advantages and Disadvantages.*

2. *Explain Consolidation of law. Why it is needed? What is the general and parliamentary procedure in enacting a consolidated legislation?*

3. *Explain the procedure and materials required for Consolidation of law.*

4. *Write short note on- a) Codification b) Consolidation of law. c) Need for Consolidation of law. d) Procedure for enacting a consolidated legislation.*

24. INTERPRETATION OF A FISCAL TAXING STATUTES

SYNOPSIS:

A. Introduction

B. Difference between tax and fee

C. Rules of Interpretation of fiscal statutes

D. Conclusion

A. INTRODUCTION:

Fiscal Statutes regulate the levy, collection and refund of tax to tax assesses. The interpretation of fiscal statute is similar to any other law.

In deciding the liability of a subject (Citizen) to tax, it is necessary to adhere to strict letter of law, and not merely to the spirit of the statute or the substance of the law.

Tax can be imposed only when the case falls strictly within the provisions of the fiscal law. Tax is imposed to raise revenue (income) for the Government to spend for public purposes and public welfare which includes improving the national economy, living standard of people, defence, law and order, etc.

Fees are also levied by Government to augment its revenue.

B. DIFFERENCE BETWEEN TAX AND FEE:

The difference between fee and tax is that in fee, specific services are rendered to the fee payer, i.e (quid pro quo - some thing in return), whereas for the tax payer, no direct services are rendered but services are rendered to public at large where the tax payer may also get benefit indirectly.

Taxes are levied by Central Government and State Governments. They are named specifically in the form of entries in List I and List II of the Indian Constitution.

C. RULES OF INTERPRETATION OF TAX STATUTES:

1. Charging Section – clear words:

1. Before taxing any person, it must be clearly established that the person to be taxed comes within the purview and ambit of the charging Section by clear words.

2. No one can be taxed by implication of law. If a person has not been brought within the ambit of the charging Section by clear words, he cannot be taxed at all.

3. The subject cannot be taxed without clear words that the person is liable for taxation.

2. Strict and favourable construction:

1. Taxing enactments should be strictly construed and the right to tax should be clearly established.

Conditions precedent to the imposition of any tax should be strictly complied with. Equitable construction should not be taken into account while construing a fiscal statute.

3. Clear intention to impose/increase tax:

The intention to impose or increase a tax or duty must be by clear and in unambiguous language. To impose a new burden by way of taxation, the intention should be in plain and in clear terms.

Intention of the legislature to impose tax can be gathered from the natural meaning of the words of the statute itself.

4. Prospective operation:

1. The cardinal principle of tax law is that the law to be applied to an assessee is the law in force in the assessment year unless otherwise provided expressly or by necessary implication.

   In other words, imposing liability to tax shall always be interpreted as prospective in operation, except when the Legislature expressly or by necessary intendment makes it retrospective.

2. No retrospective effect to a fiscal statute is possible, unless the language of the statute is very clear and plain. If the language is ambiguous or doubtful, the

doubt has to be resolved in favour of the subject and not in favour of the Government.

3. A tax can be levied only if under the provisions of the taxing statute, it is leviable.Assessment creates a vested right and hence assessee cannot be subjected to reassessment unless a specific provision is inserted by an amendment expressing that the reassessment can be retrospective.

5. Meaning in common parlance:

1. In finding out the true meaning of entries mentioned in a Sales Tax Act, it is not the dictionary meaning but the meaning as understood in common usage and parlance, specially in commercial and trade circles, must be considered.

2. There is no authority for construing a taxing statute as if it was a contract. Similarly a universal tax law cannot receive a different interpretation in different towns.

3. Any liability to taxation cannot be imposed by any provision outside the main Section, which levies the tax.

6. Imposition of tax by authority of Law:

i. The taxes and assessments can only be imposed by an authority established under a statute. No tax can be levied by order, circular, by law, regulation etc., of the

executive. The tax can be levied only by an Act of Parliament or legislature and no body or organisation less than that.

ii. Courts, can not avoid the levy of tax by applying a restricted construction on the basis of supposed hardship or on the grounds that the tax or penalty imposed is very heavy or oppressive.

7. Machinery provisions:

Machinery provisions mean the procedure for calculation and collection of taxes.

Tax exemption clause:

1. A person who claims an exemption has to establish it. An exemption clause in a taxing statute must be liberally construed in favour of the assessee.

2. The rule of strict construction in taxing statute applies primarily to the charging provisions only and has no application to the other machinery and exemption provisions.

8. No presumption as to tax :

i. As regards imposition of tax, no presumption exists. It cannot be drawn by implication or analogical extensions.

ii. The presumption for equality and against partiality of taxation exists.The language of the statute must be plain and explicit.

The language of the official statute cannot be stretched to favour the State or narrowed to benefit the subject to be taxed.

iii. In interpreting a fiscal statute, equitable consideration or assumption are entirely out of place. The Court must simply look at the words of statute and interpret them.

It cannot imply anything which is not stated or expressed. It cannot import provisions to fill up the assumed deficiency.

iv. A penalty provision of fiscal statute does not attract the rule of presumption of mental intention (Mens rea) as found in criminal offences. The word **'shall presume'** used in a fiscal statute shows that any violation of the provision which will result in penalty to the assessee is interpreted as rebuttable presumption.

9. Tax statute to be read as a whole:

The entire provisions of a fiscal statute has to be read as a whole and not in piece meals to find out the intent of the legislature. As in any other statute, the context, scheme of the fiscal Act as a whole and its purpose, relevancy etc., are to be considered.

10. No spirit of law:

A person is not liable to tax on the spirit of law or by inference or by analogy of a fiscal statute. In a taxing statute, merely what is stated clearly is looked into. No implied meaning should be taken if the words are plain and clear.

11. No Logic or reason:

If a fiscal statute has unclear and ambiguous expressions, the tax payer may escape from tax liability because he is not brought within the letter of the law. It is not unjust logic. In other words logic or reason cannot be the basis for interpreting a taxing statute.

12. Substance of matter:

The tax authorities must consider the legal aspects of a particular transaction for levy of tax. This is called **'substance of the matter'**. i.e., the true nature of transaction.

When the Courts find that there is an attempt at concealment, it will "brush away the cobweb, varnish, and show to the world the transactions in their true light" and bring the evaders to tax net.

13. Double taxation:

In interpreting a fiscal statute if one meaning gives rise to double taxation and other meaning gives rise to single taxation, then the interpretation must

be in favour of single taxation. However, if there is clear provision for double taxation, then it can not be ignored.

14. Delayed payment of tax:

Interest is levied by tax authorities on delayed payment of tax. If a fiscal statute makes a substantive provision for payment of interest only on delayed payment of tax, then it is valid.

15. Penalty - No criminal Act:

The penalty provision in a fiscal statute cannot be equated to a criminal statute. A criminal statute requires mens rea for punishment, but in a fiscal statute, levy of penalty does not require mens rea.

If tax liability has lapsed by limitation period, then such liability cannot be reopened by interpreting a statute retrospectively.

C. CONCLUSION:

In short, the general rule of construction of fiscal statute is that in case of doubt, it is decided in favour of taxpayer and against the Government. So in all fiscal statutes strict interpretation is made so that the taxpayer is benefitted.

UNIVERSITY QUESTION S FOR REVIEW:

1. *State and explain the general principles of interpretation of taxing statute.*

2. *Describe the rules relating to the construction of Taxing Laws.*

3. *What are the rules followed by the Courts while trying to interpret a taxing statute?*

4. *Discuss principles involving Interpretation of taxing statutes.*

5. *Write short note on interpretation of taxing statutes.*

6. *Strict construction is adopted for fiscal statutes – Comment.*

25. PRECEDENT AS SOURCE OF LAW- THEORIES, TYPES & PRINCIPLES OF PRECEDENTS

(LEGAL MATERIAL)(JUDGE MADE LAW) (ADVANTAGES AND DISADVANTAGES OF PRECEDENT) (CIRCUMSTANCES DESTROYING THE BINDING FORCE OF PRECEDENT)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Theories regarding Precedent

C. Types of Precedents

D. Principles in Precedents

E. Advantages of Legislation over Precedent

F. Advantages of Precedent over Legislation

G. Circumstances destroying the binding force of Precedent (The judgements which do not amount to precedent)

H. Hierarchy of Authority

I. Foreign Judgments

A. INTRODUCTION:

Precedent means anything said or done which gives a rule for subsequent saying or doing. The decisions in various cases are helpful in deciding subsequent similar cases. This is an important source of law. This is also called **judiciary law or case law or Judge made law.**

Only the decided point of law will be taken as a precedent and not the facts of a case. In India, Article 141 of Indian Constitution declares that the Precedents of Supreme Court and High Courts are effective as Legislative Laws.

B. THEORIES REGARDING PRECEDENT:

The long standing question whether **judges make law** or **simply declare the existing law** is still debated and there are **two** important theories regarding the same.

I. DECLARATIVE THEORY:

L.J. Scrutton says - the Court sits to administer the law, not to make a new law.

Lord Esher M.R. says - There is, in fact, no such thing as judge made law, for the judges do not make the law. They apply existing law to the circumstances for which there is no previous judgement as to which law is applicable.

Allen also subscribes to the declaratory theory. He says that the effort of a judge is to find the law and not to manufacture it. He deals with materials which exists in the present or the past and decides on that.

According to **Blackstone**, the judges are 'not authorised to constitute a new law, but to declare and explain the existing old laws'. In other words, the judicial function is merely declaratory in nature and not constitutive.

Prof. Hale says - the decisions of Courts bind as a law, but they do not make a new law. They simply explain, declare and publish what the law of the land is.

II. CONSTITUTIVE THEORY:

Salmond favours the Constitutive theory which is considered more rational and logical.

According to this theory, judges do make law. It means that by judicial judgments, new laws are made. The judges not only declare the existing law, but also constitute new laws.

Similarly, though the principles of equity were founded either in custom or legislation, they had their origin only in judicial decisions.

Further the rules of the common law were altered, improved and refined from time to time by judicial decisions only.

Through Precedents (decided case laws) judges make law as well as declare it. Judges have many times altered the law in good faith while declaring such law. Original precedents have come up by developing the law by Courts while they administer it.

C. TYPES OF PRECEDENTS:

1. a. Original Precedent:

The precedents lay down a original or a new principle in law and thus the creation of new principle in law is called original precedent.

b. Declaratory Precedent:

These precedents merely recognise the principles of law enacted by the Parliament or Legislature. They do not invent any new principle. If a new law is enacted and if it comes into force, the first case applying the principles of law is known as **declaratory precedent**. It interprets or gives meaning to the obscure parts of the enacted law.

When a precedent is overruled, then it is said that the prior precedent did not declare the law correctly and the overruling decision becomes a declaratory precedent.

2. a. Authoritative Precedent:

It is the precedent which should be followed by a judge eventhough he finds it incorrect. For e.g., the precedent of a Superior Court should be followed by the lower Courts. They are classified into two:

i. Absolutely authoritative precedent.

ii. Conditionally authoritative precedent.

The absolutely authoritative precedent is absolutely binding and must be followed. Conditionally authoritative precedent is generally binding but under limited circumstances, it can be disregarded.

b. Persuasive Precedent:

Persuasive precedent has no legal binding. It is evolved by the doctrine of **obiter dicta.** The judges may or may not follow it in deciding a case.

Examples are:

1. The decisions of one High Court may or may not be followed in the other High Courts in India.

2. The obiter dicta (Casual observations) of Superior Courts.

3. Judgements of foreign Courts.

D. PRINCIPLES IN PRECEDENTS:

1. RATIO DECIDENDI:

This is the principle evolved from a judgement. The principle in cases like ***Carlyl Vs. Carbolic Smoke ball Company*** and ***Ryland Vs. Flectcher*** stand as guidelines for subsequent similar cases.

For e.g., if A keeps a lion in his house, he is bound to keep it in safe custody. If it escapes and causes injuries to another, then A is liable to be punished. If any dangerous animal is kept like the lion in the above case and if it escapes and causes injury, then the principle of the above case will be applied.

The owner will be held liable and the case should be decided in the same manner. It is the authority of the judge to decide the case and not others. It should be a judicial declaration following a legal principle.

Sometimes the ratio decidendi may be incorrect. Even then, it should be followed in deciding the subsequent cases by the lower Courts. It can be corrected only by a subsequent judgement by the same Court or Superior Court or by enacting a law.

2. OBITER DICTA:

These are legal principles discussed in the Judgement but not applied to the case. Though only 'Ratio Decidendi' forms the law in the precedent, the legal principles discussed in the case are of academic interest.

Obiter dicta have no legal authority or force and they at best act as persuasive precedents.

3. STARE DECISIS:

It means that a long standing precedent should not be disturbed. This doctrine was held sacred by the Courts. Time adds strength and respect to a precedent. A precedent of long duration is better than a recent precedent.

Eventhough the old precedent is incorrect, if the society has approved it, it should be followed. If it is violated, it will disturb the society and create inconvenience to the community.

The rule of Stare Decisis is not followed by the House of Lords in England and the Supreme Court in India. They have got the power of self-correction and can over rule their own prior decisions. This is called abrogated decisions.

4. ABROGATED DECISIONS:

Stare Decisis is a wise policy and it has to be honoured, because of its long standing observance. Adhering to precedence is a rule of practice to ensure uniformity and stability in law. If it is violated, then each judge will decide an issue according his own whims and lay down his own rules. This will be lead to confusion and uncertainty of law.

Abrogated decision means overruling earlier decisions by new decisions. In this process, the earlier law is repealed and over thrown.

Abrogated decisions are necessary in modern days for the following reasons:

1. The rule of 'Stare Decisis' cannot be followed blindly and mechanically. If so followed, it would dwarf and stultify the growth of the law. Further it will affect the capacity of the precedent to adjust itself to the changing needs of the society.

2. By following the previous decisions, if errors are likely to be perpetuated and grievous wrong is likely to result, then such previous decisions can be abrogated.

3. If a previous decision has an error, then it should be uprooted when an occasion arises. Erroneous judgments should not be allowed to spread its roots still further. There is no virtue in mere blind uniformity for the sake of uniformity.

4. If public interest demands that the previous decision has to be reviewed and reconsidered, then the previous decision can be abrogated.

5. Just because the decision of yesterday was wrong, it need not be carried for today so that the wrong is also consciously continued for today.

However the Court must be extremely cautious and careful before abrogating a judgment which has been acted upon for several years.

5. RES JUDICATA:

It means "a judgement of a Court of competent jurisdiction may not be disputed on the matters of fact and status by the parties or their successors in any subsequent legal proceeding".

For e.g., if a property dispute between A and B is conclusively decided by a Civil Court, then A and B cannot file a civil suit on the same properties in the same Court or of equal or lower Courts.

Res Judicata binds only the parties to disputes and applies only to matters of fact. Precedent, on the other hand, binds everyone who files a case in the Courts and operates only on points of law.

5. PROSPECTIVE OVERRULING:

This new doctrine is evolved in America. It means overruling of an established precedent and such overruling is limited only to future cases. All

those cases decided earlier to the date of such overruling would be governed by the old precedent itself. Even the case in which the doctrine of prospective overruling was evolved could be decided by the old precedent itself.

The doctrine was evolved in ***Great Northern Railway Vs. Sunburst oil and Refining Company***. The doctrine was for the first time applied in Golak Nath's case and Keshavanandha Bharathi case in India.

E. ADVANTAGES OF LEGISLATION OVER PRECEDENT:

(Refer Chapter No. 22, Page No. 163)

F. ADVANTAGES OF PRECEDENT OVER LEGISLATION:

(Refer Chapter No. 22, Page No. 163)

G. CIRCUMSTANCES DESTROYING THE BINDING FORCE OF PRECEDENT:(THE JUDGEMENTS WHICH DO NOT AMOUNT TO PRECEDENT)

1. If a Statute or Statutory rule is subsequently enacted which is inconsistent with the precedent or it is reversed or overruled by a higher Court, then the precedent ceases to be binding.Reversal may occur in appeal when the appellate Court reverses the lower Court's judgement.

   Overruling may occur when the higher Court declares in another case that the already existing precedent was wrongly decided and hence should **not be followed.**

2. If a decision is affirmed or reversed on appeal on a different point, then it is deprived of absolute binding.

3. If any precedent is rendered in ignorance of existing Statute or rule, then it is not binding.

4. If the Court that decided the precedent has overlooked an inconsistent decision of a higher Court, then the precedent loses its binding force.

   For e.g., if a High Court decides a case in ignorance of a judgment of the Supreme Court and against the judgment of the Supreme Court, then the judgment of the High Court has no binding force.

5. If a precedent is in conflict or inconsistent with the earlier decision of the same Court, then the precedent loses its binding force. However, if there are inconsistent earlier decisions, then the Court is free to follow either of the earlier judgments and such a later judgment is binding.

6. If a particular point of law involved in a decision is not argued fully, then the precedent ceases to be binding.

   For e.g, if a decision is without argument, without any reference to main words in the rules and without any citation of authority, then such precedent is called **precedent sub silentio** and not binding.

7. When an appellate Court is equally divided, then the appeal is dismissed and so the precedent ceases to be binding.

8. If decisions are made based on wrong principles violating the fundamental principles of common law, then such precedents are not binding, but sometimes certain such erroneous decisions may have been followed for sufficient length of time i.e., on the principle of stare decisis, then such precedents are binding unless overruled.

H. HIERARCHY OF AUTHORITY:

The general rule is that a Court is bound by the decisions of all Courts higher than that of it. For e.g., a High Court Judge cannot question a decision of Supreme Court and similarly, a judge of a District Court cannot question the decision of its High Court. However, the Courts are not bound by the decisions of the lower Courts or equal Courts.

In earlier days, the Courts were bound by their own earlier decisions. This is called 'Auto Limitation'. But of now, the Courts are at liberty to deviate from their own earlier decision, but such deviation must be rarely resorted to and there must be adequate reasons for such deviation from the earlier decision.

In India, the hierarchy of authority in precedents are in the following descending order:-

- Full Bench of Supreme Court
- Division Bench of Supreme Court
- Single Judge of Supreme Court

- Full Bench of High Court
- Division Bench of High Court
- Single Judge of High Court

Only the decisions of Supreme Court and High Courts are authoritative precedents and binding on the lower Courts and not the decisions of other Courts.

It is necessary that the decisions of the higher Courts must be of *Ratio Decidendi* and not *Obiter Dicta.* It means the Judge of the higher Court must have developed the rules of law while in the process of its application in deciding the case and while acting as a Judge. In other words, it should not be a statement made by the Judge in his extra-judicial capacity.

I. FOREIGN JUDGEMENT (Sec. 13 & 14):

A Foreign Judgement is a judgement delivered by Courts outside India. As per Sec. 13 C.P.C., a foreign judgement delivered in a Court abroad acts as Res judicata and thus Indian Courts are prevented from entertaining the same case already decided by the foreign Courts.

PRESUMPTION IN FOREIGN JUDGMENT:

The foreign judgement in such a case is presumed to be final and conclusive.

However, there are **six exceptions** to this rule where Indian Courts are authorised to exercise jurisdiction in deciding the cases already decided by foreign Courts:

1. If the judgement is delivered by an incompetent Court (i.e., the Court should not have jurisdiction or must have exercised ultra vires jurisdiction).

2. If the judgement is not given on the merits of the case, then the Indian Courts can hear such decided cases again for e.g., ex-parte judgements, compromise judgement, etc.

3. If the judgement appears on the face of the proceedings, to be violative of International Law.

4. If the judgement, on the face of the proceedings, appears to refuse to recognise the law of India. In other words, it must be clear derecognition of Law of India.

5. If the judgement has been obtained by fraud.

6. If the judgement is based on a claim which is a breach of Law in India.

ENFORCEMENT OF FOREIGN JUDGEMENT IN INDIA:

Any conclusive foreign judgement can be enforced in India in the following ways:

1. A suit may be instituted on such foreign judgements.

2. According to Sec. 44 A of the Civil Procedure Code, a decree passed by superior Courts in a foreign country can be executed in a District Court in India by producing the certified copy of such decree.

3. A suit filed in Indian Courts on a foreign judgement can be executed in the foreign country.

4. Suit on a foreign judgement is not a Small Cause suit.

5. Unless a suit on foreign judgement is for an ascertained sum of money, it cannot be enforced.

6. A suit upon foreign judgement can only be brought against persons against whom foreign judgement was passed.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *State the three shades of meaning attached to the expression "Ratio decidendi". Explain the circumstances destroying the binding force of precedent.*
2. *Discuss the relative advantages and disadvantages of legislation and precedent.*
3. *Precedents possess a distinct and legally recognised law creating power. This power is however purely constitutive and in no degree 'abrogative'. Explain and discuss.*
4. *a. Distinguish between "Ratio Decidendi" and "Obiter Dicta".*

   b. When is a precedent not binding?
5. *Compare and contrast legislation and precedent as sources of law.*

a. *Critically examine the Blackstonian doctrine that "judge do not make law, but only declare what has always been law".*

b. *What are judge - made laws? Explain the principles of judicial law making?*

c. *Examine precedent as a source of law. Compare it with that of legislation.*

6. *'Courts have the power of developing the law at the same time that they administer it' Salmond – Comment.*

7. *Discuss the rules of interpretation of Statutes and point out when Courts are justified in deviating from literal interpretation and adopting logical interpretation.*

8. *What is hierarchy of authority in precedents?*

9. *What are the judgments which do not amount to precedent?*

26. CONFLICT AMONG LEGISLATION, PRECEDENT & CUSTOM

(SHORT NOTE)

Among the three sources of law namely legislation, custom and precedent, which will prevail other the other, when there is a conflict among them?

(A) CONFLICT BETWEEN LEGISLATION AND CUSTOM:

In England, for legislation, there is existence and also authority and hence it is ***de jure***, whereas since the customs are generally based on the will of the people, they have only implied authority of State.

Further, legislation is an advanced method of legal development and it is characterized by the mark of mature legal system. Hence, legislation is considered to be superior in hierarchy and more authoritative source of law than customs.

Customs are not law, but only a source of law. The function of legislators is to collect customs and give a better form to them by legislations.

(B) CONFLICT BETWEEN LEGISLATION AND PRECEDENT:

According to analytical jurists like Sir John Austin and Bentham, legislation is always superior to precedent. Because, a statute is made after due deliberation and not in the haste in which a judge decides his cases.

Legislation is certain, clear, comprehensive, and easily accessible. It passes through the scrutiny of a great number of men before it becomes law. Whereas Precdent (case law) is the result of the whims of certain individuals. A planned progress of society is possible only through statute law.

Law can be made only through legislation. The judge made law is an encroachment upon the power of a legislator to make law.

To conclude, the relative binding force among the three sources is in the following order - Legislation, Precedent and Custom.

27. RIGHTS - DEFINITION, CHARACTERISTICS AND KINDS /TYPES

(INTEREST - RELATION TO RIGHTS)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Definition of Right and Legal Right

C. Ingredients of Legal Right (Characteristics of right)

D. Types of Rights

E. Relationship of Right with - Liberty, Power, Immunities, Duties and Claims

F. Ubi jus ibi remedium

A. INTRODUCTION:

In the nature of things, interests of one individual conflict with the interests of another and hence it is impossible that all interests can be permitted by law. So, Law recognises only certain interests and rejects others.

B. DEFINITION OF RIGHT AND LEGAL RIGHT:

There are many rights other than legal rights also. For e.g., moral or ethical rights. So it is necessary to know the difference between right and legal right.

I. RIGHT:

Holland defines right as one man's capacity of influencing the acts of another, by means of the opinions or the force of society.

Hibbert defines right as one person's capacity of obliging others to do or forbear by the strength of a third party.

If such third party is God, the right is called **Divine right.**

If such third party is the public opinion, then the right is called **Moral right.**

If such third party is the State acting directly or indirectly, the right is called **legal right'.**

II. Legal Right:

In Jurisprudence, the term right means and refers to legal right only.

An interest recognised by the law of the State is called a Legal right.

1. Austin:

Austin defines legal right - "A party has a right when another or others are bound or obliged by law to do or forbear towards or in regard of him".

2. Ihering:

Ihering defines rights as "legally protected interests". But the law does not protect all interests. As the interest of men conflict with one another, law only appraises interest according to justice and selects only some interests for protection.

3. Salmond:

According to him, an interest to be regarded as a legal right, it should obtain not merely legal protection but also recognition. Salmond thus defines a legal right as 'an interest recognised and protected by a rule of legal justice'.

4. Holland:

Holland defines a legal right as "a capacity residing in one man of controlling with the assent and assistance of the State, the actions of others".

C. INGREDIENTS OF LEGAL RIGHT (CHARACTERISTICS OF RIGHT):

There are **five** essential elements for a legal right:

1. The first essential is the **owner of the right or the 'subject of the right"** i.e., a person in whom the right resides or the person entitled to the right is called the owner of the right.

2. The second essential is a person against whom the right is availed i.e., **"the person of incidence"**. Such a person is called "**subject of the duty".**

3. The third essential is the **"contents of the rights".** The act or forbearance which a person bound is obliged to observe in favour of the person entitled.

4. The fourth essential is the **"subject of the rights"** of the **"subject matter of the right"** or the thing over which the right is exercised.

5. The fifth essential is the "**title"** - i.e., the events by **which the right has become vested in the owner.**

Illustration of the elements of Legal right:

"A" leaves a diamond ornament to "B". "A" becomes the subject or owner of the right. The diamond ornament is the object of the right, the delivery of the ornament is the content of the right, the executor is the "person of incidence" and the will bequeathing the ornament is the "title" of the right.

Thus the three terms **"Person", "Act",** and **"Thing"** are inseparably connected with the term **"Right".**

D. TYPES OF RIGHTS:

RIGHTS ARE DIVIDED INTO:

1. Perfect and Imperfect Rights
2. Positive and Negative Rights
3. Right in Rem and Right in Personam
4. Proprietary and Personal Rights
5. Rights in Re Propria and in Re Aliena
6. Principal and Accessory Rights
7. Legal and Equitable Rights
8. Primary and Sanctioning Rights
9. Public and Private Rights
10. Vested and Contingent Rights
11. Natural Rights and Legal Rights

1. PERFECT AND IMPERFECT RIGHTS:

A perfect right has a corresponding perfect duty. A duty is perfect only when it can be enforced by the Courts. For e.g., debts within the period of

limitation. Here the Courts recognised the rights and enforce the same with the aid of the physical force of the State. Enforceability is the test of a right. This is know by the latin maxim ***"Ubi jus ibi remedium"*** (Where there is a right, there is a remedy).

There are rights and duties recognised, but not enforced by law. Such rights are called **imperfect rights**. An imperfect right is recognised by law, but not enforced by it. For e.g., debts barred by limitation unregistered documents, when registration is compulsory etc.

Here the rights continue to remain valid, but it cannot be enforced through a Court. Lapse of time does not destroy the right but merely bars its enforcement. E.g.: Duty to give charity to the poor is imperfect duty and paying one's debt is perfect duty.

Exceptions:

In the following cases, law recognises imperfect rights for certain purposes.

1. An **imperfect right** can act as a valid ground of defence.

   For e.g., after the expiry of the limitation period, if a debtor's money comes into the hands of creditor, he can appropriate the same to the barred debts.

2. Sometimes, an imperfect right can be made perfect.

   For e.g., if an instrument is not stamped or under stamped, then after paying the prescribed penalty, it becomes legally enforceable.

3. An imperfect right can be a valid consideration to create a new contract.

For e.g., if the debtor renews a time barred debt in writing, then a new contract is deemed to be entered and becomes legally enforceable. This is called acknowledgement of a barred debt.

4. An imperfect right is sufficient to support any connected security.

For e.g., a mortgagee can keep the mortgaged property as security till his mortgaged debts are paid even after the limitation period for recovery expired.

2. Positive and Negative Rights:

Positive rights correspond to positive duties. Positive duty is the duty to do something. For e.g., law enforces the positive duties of parties in contracts, trusts, sale, partnership and personal duties in marital relations etc.,

Negative rights correspond to negative duty. A negative duty is a duty to forbear from doing something. For e.g., duty not the trespass in another man's land, duty not to create nuisance to the others.

Positive wrong is wrong by some positive act and negative wrong is wrong by omissions. E.g., when a person has to do a particular act, his duty is positive.

When he omits to do that act, the omission is a **negative wrong**.

Law generally consists of **negative duties**, i.e., to forbear a person from doing an act. **Positive duties** arise to compel a person in doing an act.

3. Rights in Rem and Rights in Personam:

The term right in rem is derived from the latin term **jus in rem**. It means a right against or in respect of a **thing**.

Right in personam is derived from latin term **jus in personam**. It means a right against or in respect of a **person**.

Rights in Rem:

Every right involves a real and also a personal relation.

Right in rem is available against the whole world i.e., against all persons in the State. It corresponds to a duty imposed on persons in general. E.g., Right of ownership of property is available against the whole world and every body has a duty not to interfere with the owner's use and enjoyment of his property.

Right in rem is otherwise called a **real right** and **jus in rem**. Jus in rem means a right in respect of a thing.

The illustrations for right in rem are the rights of a patentee, rights of the owner of goods, etc.

Rights in Personam:

Right in personam is available against a particular person/persons only. It corresponds to a duty imposed on particular individuals. It usually arises out of a contract.

For e.g., Right of the creditor to recovery of debt from the debtor. It may also be a personal right arising independently of contract. For e.g., Right to claim compensation for accidental injuries, false imprisonment, defamation, etc. So right in personam is called a **personal right or jus in personam**.

Jus ad rem is a right to a right. For e.g.: If A agrees to sell his house to B. B acquires a right to specifically enforce the contract. This right is out of the right of equitable ownership in the house. So it is called jus ad rem. Irrespective of whether the original right is right in rem or rights in personam, jus ad rem is always a right in personam. It is also called a **species of right in personam**.

DIFFERENCE BETWEEN RIGHT IN REM AND RIGHT IN PERSONAM:

1. Right in rem is mostly negative. It is a right that other people should not interfere with the right of ownership of one percent. Right in personam, on the other hand, is usually positive.

2. In right in rem, emphasis is on the object of the right, but right in personam is a personal rights and the emphasis is on personal relations.

3. Right in rem is also known as real right. Right in personam is often termed personal right.

4. In right in personam, there is jus ad rem, but in right in rem, there is no such right.

5. In right in rem, there is a corresponding duty imposed upon persons in general, but in right in

personam the corresponding duty is imposed upon a definite individual/s.

6. A right in rem is interest to protect against the world at large, whereas a right in personam in an interest to protected against definite, individual/s.

7. The right in rem is a right in respect of a thing whereas right in personam is a right in respect of a person.

8. The right in rem is a relation between the owner and unidentified infinite number of persons whereas the right in personam is a definite relationship between determinate individuals.

9. The distinction between rights in rem and in personam applies not only to rights alone, but also to liberties, powers and immunities.

4. Proprietary and Personal Rights:

i. Proprietary rights:

These are rights which constitute a man's property, E.g., any right that has economic value - a right in land, movable property, benefits of a contract, etc.

Proprietary rights are elements of man's wealth and have both economic and judicial significance. Almost all proprietary rights except a few are alienable (transferable).

ii. Personal Rights:

Rights which have no economic value are called personal rights. E.g., conjugal rights, parental rights, citizenship, etc.

Thus personal rights are concerned about welfare and has only a judicial significance. Personal rights re inalienable (not transferable).

In personal rights, the term 'Status' is very important.

Status:

Status includes not only the owners rights, but also his duties liabilities and disabilities.

Status is defined as - the aggregate of rights and duties which law attaches to person, as one of a class, and these rights and duties are incapable of being changed at the desire of the person affected by them.

Austin explains status as the aggregate of the entire rights and duties of a person considered as a member of a class. E.g., status of infant, trustee, widow and others.

John Salmond is of the view that status is an individual's personal rights and duties as distinct from his proprietary rights and duties which have an economic value.

Allen defines status as "the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities and incapacities of both". Capacity means the power of acquiring rights.

Sir Henry Maine says that status is a legal condition in which rights and duties are imposed by operation of law.

The essential conception of status is that rights and duties are determined by law and not by the individual. Such rights and duties cannot be varied even by contract by the persons constituting a particular status.

Dicey has given **seven** kinds of Status. (i) Parent and Child (ii) Guardian and Ward (iii) Infancy (iv) Legitimacy (v) Husband and Wife (vi) Lunatic and Curator or Committee and (vii) Corporations.

5. Rights in (Jura) Re Propria and Rights (Jura) in Re Aliena:

Proprietary rights are of two kinds:

1. Rights over one's own properties are called ***rights (jura) in re propria***.

2. Rights over another man's properties are called ***rights (jura) in re aliena***. This is also called **encumbrances**.

Sometimes the rights of a person over his property becomes subject or subordinate to a right vested in another person.

E.g.: The right of a land owner may be limited by the right of way of the neighbour. In such a situation, the owner's right is not full and he has to make room for the right vested in the other person. Such a right vested in the other person is called a right in re aliena or encumbrance.

The general right of the owner is called the **servient right** while the right in re aliena is called the **dominant right**.

When the servient land changes hands, the encumbrance follow to the new owners and thus it runs with the land.

6. Principal and Accessory Rights: (Primary and Secondary Rights)

Principal rights exist independently of other rights, while **accessory rights** are appurtenant to principal rights.

For e.g., when a debt is secured by a mortgage, the debt is the principal right and the security is its accessory.

Similarly if a owner of a piece of land has a right of way over another man's piece of land, then the ownership of the piece of land is the principal right and the right of way attached to the principal right is the accessory right.

Thus the right that is thus supplementary to another right is called an Accessory right and the right to which it is attached is called the Principal right.

7. Legal and Equitable Rights:

Rights protected by the Courts of Law in English Law were called legal rights. E.g., Right to repayment of debt, right of eviction in lease, etc.

Certain rights which were not recognised at common Law were protected by the Courts of Equity. Such rights were called equitable rights – E.g., right to avoid a contract entered by mistake, right of redemption of a mortgaged property, etc.

Now this distinction has dwindled and no longer is present.

8. Primary Rights (Antecedent Rights) and Sanctioning Rights (Remedial Rights):

The right which arises as a sanction imposed by law on a wrong doer for his wrong is called **Sanctioning rights**. They are otherwise called as **Remedial rights**. For e.g., Law of Torts.

All others are **Primary rights** and also termed as **Antecedent rights**.

Primary rights are the bundle of rights enjoyed by any person, e.g., a person's right to mortgage, lease, rent etc. A violation of the primary rights gives rise to a sanctioning right or remedial right.

Primary rights exist independently, but sanctioning rights have no independent existence and arise only on the violation of primary rights.

9. Public and Private Rights:

Public rights are the rights vested in the State as the persons possessing rights are held as representative of the public.

Rights belonging to the individuals are private rights. E.g., right to vote is a public right whereas the right of ownership of a property is a private right.

10. Vested Rights and Contingent Rights:

A **vested right** is a right in which all events essential to vest the right in the owner have happened.

For e.g., X transfers a property to Y, a living person. Now Y acquires a vested right in the property.

A **contingent right** is a right in which the vesting is complete only on the happening or non-happening of a specified uncertain event.

For e.g., A property is given to an infant on his attaining majority. Now the infant acquires a contingent right in the property.

Condition in the case of a contingent right may be a condition precedent or a condition subsequent.

Difference between Vested right and Contingent right:

1. A vested right is not dependent upon the fulfilment of any condition, but a contingent right is dependant on the fulfilment of a future and certain event.

2. A vested right is not lost by the death of the transferee before he obtains possession, whereas a contingent right is lost by the death of the transferee if the condition has not been fulfilled.

3. A vested right is inheritable and transferable, whereas a contingent right is inheritable and non-transferable.

11. Natural rights and legal rights

Natural rights:

Natural rights are rights not dependant upon the laws, customs, or beliefs of any particular culture or government, and therefore universal and non - transferable.

Natural rights are considered beyond the authority of any government or international body to interfere. The Universal Declaration of Human Rights is an important legal instrument enshrining natural rights to international law.

John Locke identified natural rights as being 'life, liberty, and property', and argued that such fundamental rights could not be surrendered in the social contract to grant power to the ruler.

According to Locke, there are **three** natural rights:

i. **Life:** everyone is entitled to live once they are created.

ii. **Liberty:** everyone is entitled to do anything they want to so long as it doesn't affect the life of another.

iii. **Property:** everyone is entitled to own all the properties they create or gain through gift or trade if they don't conflict with life or liberty.

LEGAL RIGHTS:

Legal rights are bestowed on to a person by the law of a particular political and legal system, and therefore, applicable to specific cultures and governments.

Legal rights may be constitutional, statutory, regulatory, contractual, common-law, or conferred by international human rights law.

Legal rights are almost always controlled by the law which created the right itself or by legal rights held by others. Legal rights can be enforced in courts of law against other who has infringed it.

The right may be enforced by a court order or injunction prohibiting the other person or persons from infringing a right, by the awarding of money to compensate the holder of the right.

E. RELATIONSHIP OF RIGHT WITH - LIBERTY, POWER, IMMUNITIES, DUTIES AND CLAIMS:

1. RIGHT AND LIBERTY:

Liberty or Privilege is the benefit by absence of duty. It refers to activities according to one's own pleasure and will. There is no legal obligation on the person concerned to do or not to do something. Thus liberty is an interest of

unrestricted activity recognised and allowed by law. Liberty is also called **Permissive Right**.

Liberty is different from Right. A right has a correlative duty on others, whereas liberty has no correlative right in another and also absence of legal duties imposed upon self.

E.g.: A constructs his new house adjacent to B's house which is already constructed. A can prevent the light and air to B's house. The interest of A to do any act in this house is at his pleasure and it is called Liberty.

But if B's house was constructed 20 years back and B has been continuously enjoying free air and light for 20 years, then there is a duty on A as not to obstruct the light and air to B. So, the liberty of A is now reduced to a right.

Salmond says "rights are what others are to do for me; liberties are what I may do for myself". E.g., A person is at liberty to express his opinions on public questions, but he has no right to publish a defamatory statement regarding another person.

2. Right - Power and Liability:

Power is the ability to affect legal relations. It signifies the ability of a person to change a legal relation.

Salmond defines power as the ability conferred upon a person by the law to determine (by his own will) the rights, duties, liabilities or other relations of himself or others. For e.g., Courts' power to decree injunction, divorce, judicial separation, etc., Similarly the President's power to proclaim emergency, etc.

For every **power**, there is a corresponding **liability,** as in the case of right where there is a corresponding duty. Power is divided into **authority and capacity**.

Authority is the ability to affect the legal relations of other persons - E.g., Court's authority to grant injunction.

Capacity is the ability to affect one's own legal relations - E.g., a person's capacity to take in adoption.

Power is again divided as - **Public powers** and **Private powers**. Powers vested with the agents of the Government are public powers - E.g., Judge. Private powers are exercised for self purposes - E.g., power to sell a property.

3. Right and Immunity:

Immunity is a person's freedom from having his legal relations affected or altered by other persons. For e.g., the immunity of an Ambassador from arrest under local laws. Immunity is exemption from the legal powers of others. The corresponding element of "Immunity" is **disability** - meaning absence of freedom from having his legal relations affected or altered by others.

Right is different from immunity in that right has a corresponding duty whereas immunity has a corresponding disability.

4. Right and Duty:

Duty when breached would become a wrong. A wrong means any act in violation of a right. Duty therefore implies an obligatory act or forbearance. The duty may be moral duty (opposite of moral wrong) or legal duty (opposite of legal wrong).

5. Right and Claim: (Right in strict sense)

The right in strict sense is called 'claim'. It means an interest which another person is obliged to respect. It is an interest of one person which others are bound to give effect to. Thus in claim, an interest is vested in one person and a corresponding obligation or duty is imposed on another or others. If the persons bound by the corresponding duty violates it, they are committing a wrong.

F. UBI JUS IBI REMEDIUM:

This maxim means - **'where there is a right, there is remedy'**. Whenever a right is violated, then the person having such right has a remedy against the person who has violated it. In other words, for every wrong, there is a remedy.

Ashby Vs. White:

The defendant refused to register a qualified voter, i.e., the plaintiff. So, the plaintiff could not poll his vote in the election. However, the candidate of the plaintiff's choice was elected. Hence, there was no loss or damage to the plaintiff, but still since his legal right to poll his vote in the election is violated, he could claim compensation.

The Court held that the violation of the plaintiff's statutory right to vote was an injury to him and hence there should be a remedy for such wrong.

If any person has a legal right, then he must have the means to establish, maintain, safeguard and be able to seek remedy in case of its violation by others. In other words, if a right has no remedy for its violation, then such right is of no use.

However, this maxim does not apply to moral or social rights. For e.g., if a person makes a promise to give a loan to another, then the other person has no right to enforce it because it is not a legal duty to the creditor to give loan.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What are the characteristics of a legal right?*
2. *Explain and illustrate the different kinds of legal rights.*
3. *Define a right. What are the characteristics of a right?*
4. *Distinguish between: (a) Right and Liberty (b) Right in Rem and Right in Personam (c) Perfect and Imperfect right.*
5. *Define a legal right, pointing out is characteristics.*
6. *Write short notes on: (a) Encumbrance (b) Right (c) Liberty*

28. RELATIONSHIP BETWEEN RIGHTS AND DUTIES

(RIGHTS AND DUTIES ARE CORRELATIVE)(VINCULUM JURIS)(JURISTIC CONCEPT OF RIGHTS AND DUTIES)

SYNOPSIS:

A. Introduction

B. Salmond's and Hohfeld's view of rights and duties (Hohfeld's analysis of legal right)

C. Austin's view of rights and duties

i. Relative Duties

ii. Absolute Duties

D. Conclusion

A. INTRODUCTION:

A right denotes 'an interest which another person is obliged to respect'. It is an interest in a person. Others are bound to give effect to it. An interest which is recognised or approved by law is called a right.

A duty is 'an act which a person has to do or to abstain from doing and the opposite of it would be right'.

B. SALMOND'S AND HOHFELD'S VIEW OF RIGHTS AND DUTIES: (HOHFELD'S ANALYSIS OF LEGAL RIGHT) - [VINCULUM JURIS]

According to **Salmond and Hohfeld**, rights and duties are necessarily correlative. They are inseparable. There can be no right without duty. In the same way, there can be no duty without right. Both must exist side by side. For e.g., If "A" has got a copy right over a

particular book, it is the right of "A". Others are under a duty of not copying the contents of the book in any form. So right and duty exist side by side.

According to **Hohfeld**, 'duty' and 'right' are correlative terms. When a right is invaded, the corresponding duty is violated. According to Salmond rights and duties or always correlative. Right and duty together create a 'legal bond', called Vinculam Juris.

For e.g., if X has a right against Y that Y shall not use the X's land, then the correlative is that Y is under a duty towards X that Y shall not use the X's land.

C. AUSTIN'S VIEW OF RIGHTS AND DUTIES:

Austin differs from Salmond and Hohfeld. According to Austin, rights and duties are not always correlative. He classifies right into **two** types depending on the nature of duties.

I. Relative Duties: (Vinculum Juris)

Relative duties are always correlated with some rights. Such rights are known as relative rights.

II. Absolute Duties:

Absolute duties are not correlated to any rights. They are absolute by themselves. This view of Austin of absolute duties is rather strange and it differs from the views expressed by other jurists. Austin gives the following illustrations for the absolute duties. He says that for these absolute duties, no corresponding rights are necessary:

1. Self regarding duties, i.e., duties owed to oneself. For e.g., not to commit suicide.
2. Duties owed to non-human beings. For e.g., God and animals.
3. Duties towards indeterminate persons.

1. Self Regarding Duties:

By self regarding duty, we mean that it is a duty owed to oneself.

For e.g., if a person owes a **duty** as not to commit suicide, then there is no **right** upon others. The community has no interest in his life. So, no corresponding right exists for the duty as not to commit suicide. Here the duty is absolute, since there is no corresponding right.

Criticism:

Austin is not correct in this aspect. The society is interested in every one's welfare and his well being. The sole aim and purpose of society is to serve an individual. So society is interested in one's life and they can have their right that a particular person should not commit suicide. So a duty is imposed upon that person as not to commit suicide.

If he attempts to commit suicide, then the society punishes him - Attempt to commit suicide is an offence under the I.P.C. (Sec. 306) (Please note that this Section is now deleted from the I.P.C.)

2. Duties to non human beings:

For e.g., if a person owes a duty to God, that he will not commit blasphemy (insulting god), the corresponding right for such a duty lies with the God. God cannot come and ask the person to exercise such duties. So, the duty is absolute and there is no corresponding right for it.

Criticism:

The duty as not to commit blasphemy to God is not actually to God. But it is only for the religious welfare and faith of the community, as it affects their feelings and sentiments. The community can demand the person not to commit blasphemy. If he attempts to commit blasphemy or commits blasphemy, then he can be punished under the I.P.C. (Sec. 295).

3. Duties to indeterminate persons:

Austin says that legal right can lie only with a determinate person and it does not lie with indeterminate body like community, corporation, etc. A man can owe a duty to the society. According to Austin, society cannot hold a right, because it is indeterminate body.

Criticism:

Austin has not given any convincing reason for confining rights to determinate individuals only. The community possesses interest and it enforces it through its representative Government etc. If a person does any public wrong (E.g. public nuisance), then he can be punished for the violation of public right.

Austin also says that duty to pay tax and duty to render military service are absolute duties. The Government cannot exercise the corresponding right - that is, to compel a person to pay tax. Here again Austin is wrong.

Every ordinary person can create right for himself against others. A citizen is faithful to the State and he gets various benefits like protection, etc., and naturally he owes a duty to the State to pay tax, etc., for the benefits he receives from the State. Further State can impose fine and penalty, if a citizen does not pay tax.

D. CONCLUSION:

Salmond and Hohfeld affirm that there can be no legal conception as absolute duty. Duties and rights are always correlative whether the rights are public rights or private rights. The right and duty is a legal bond, i.e., ***vinculam juris*** (legal bond).

UNIVERSITY QUESTIONS FOR REVIEW:

1. *"Rights and Duties are correlative"- Discuss.*
2. *"Rights and Duties are necessarily correlative"- Salmond. Does Austin consent with this view - Discuss.*
3. *Explain 'Relative Duties' and 'Absolute Duties' as according to Austin.*
4. *Duty and Right are correlated terms – Hohfeld. Comment.*

29. POSSESSION

(KINDS, ELEMENTS & MODES OF ACQUIRING POSSESSION) (POSSESSORY TITLE, POSSESSORY LIEN)(POSSESSORY REMEDIES/POSSESSORIUM)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction
B. Kinds of possession
C. Need for protection of possession
D. Element of a valid possession
1. Animus possidendi
2. Corpus possessionis
E. Modes of acquiring possession (Acquisition of possession)
F. Possessory title
G. Possessory Lien
H. Possessory remedies or possessorium
I. Difference between Possession and ownership
J. Conclusion

A. INTRODUCTION:

Possession is the visible expression and main evidence of ownership. Possession is nine points in law, which means the possessor is usually presumed to be the owner of the thing possessed.

B. KINDS OF POSSESSION:

Possession is classified into **three** types:

1. Corporeal Possession and Incorporeal Possession
2. Mediate and Immediate Possession 3. Concurrent Possession

1. Corporeal Possession and Incorporeal Possession:

i. Corporeal Possession:

It is the possession of a material object. It creates a continuous relationship between the person and the material object. For e.g., possession of land, building, books, etc, are corporeal possession.

ii. Incorporeal Possession:

It is the continuous exercise of a claim over any immaterial object or the use of a material object. For e.g., Copy right, Trade mark, Good will, Easement, etc.

2. Mediate and Immediate Possession:

i. Mediate Possession:

If any person possesses a thing for and on behalf of some other person, then the first person possessess the thing as a representative/agent of the other person. Thus, when possession is held through another person, it is called Mediate Possession.

Mediate possession is of **three** types:

a. Possession directly through an agent/servant:

If a person acquires possession through an agent/ servant who possesses the thing for the above person on his acccount and does not claim any interest of his own, then such possession is called possession directly through an agent/servant.

For e.g., If a person deposits goods in a warehouse, then the warehouse man is the mediator through whom the possession is held.

b. Possession on both principal/master and agent's/ servant's account:

If a possession is held by the agent/servant and if it is held in his account and the account of the principal/master and if the agent/servant recognises the superior right of the principal/master, then it is a mediate possession on both principal/master and agent's/servant's account.

For e.g., tenancy at will where the tenant occupies a house at the will and pleasure of the landlord and surrenders possession to landlord on immediate notice.

c. Conditional mediate possession:

The person having the right to claim immediate possession keeps the possession with another person until the expiry of certain period or on fulfillment of certain condition.

Such other person must acknowledge the title of first person for whom he holds the thing and must be prepared to deliver it, when the temporary possession comes to an end. Such mediate possession through another is called conditional mediate possession. For e.g., pledging the goods till the debt is repaid.

To conclude, in mediate possession, there are two persons who are in possession of the same thing at the same time. The mediate possessor is in relation with the direct possessor by holding of thing for him and on behalf. For e.g., landlord and tenant, bailor and bailee, master and servant, principal and agent, etc.,

ii. Immediate Possession:

When possession is held directly by a person, it is called Immediate Possession.

For e.g., if A purchases a watch, he gets immediate possession of the watch as soon as it is delivered to him by the shop keeper. But if his servant purchases the watch on master's behalf, then the servant gets immediate possession of the watch as soon as he gets it and the master as the owner of the watch gets mediate possession.

When the servant hands over the watch to the master, then immediate possession is transferred to the master. Mediate possession always co-exists with immediate possession, but the reverse is not true.

3. Concurrent Possession:

There are **three** kinds of concurrent possession:

a. Mediate and immediate possession.

b. Possession of a thing by co-owners, as for e.g., a house being possessed by two brothers in common.

c. Corporeal possession co-existing with incorporeal possession.

For e.g., A possesses a land. B has a right of way over it. A cannot exclude B from using the way and B cannot

exclude A from using the land. B's right of using the way is incorporeal possession and A's possession of land is corporeal possession.

C. NEED FOR PROTECTION OF POSSESSION :

Law protects possession even when it is wrongly obtained.

There are 3 reasons for the protection of possession:

REASON- 1:

Protection of possession helps the criminal law to preserve the peace. According to Savigny, the protection of possession is a branch of the law for protecting the person possessing the property.

According to him, possession is protected in order to remove unlawful acts of violence against the person in possession. Interference with possession leads to a disturbance of peace.

Law and Order is best secured by protecting a possessor and leaving the true owner to seek his remedy by approaching a Court of Law.

REASON 2:

Possession is protected as part of the Law of Torts. According to Kant, possession should be protected by law, because a man by taking possession of an object has brought it within the sphere of his will and control. It is the object of each State to protect one's will.

As possession is by the will of a person, it is to be protected by law. The freedom of will is the essence of personality and has to be protected as long as it does not conflict with the universal will, that is, the State.

Since possession involves an extension of personality over the object, it is protected by law. Just as a person's reputation is protected against defamatory attacks, so also the things in his possession are protected from disturbance by fraud.

REASON 3:

Possession is protected as part of the law of property. In the early stages of the development of the law of property, when proof of title was difficult, it was felt unjust to burden a person to prove his title.

The law therefore presumed that the possessor was the owner until a superior title was shown to exist in some other person. In this way, possessions came to be protected by law.

Inhering says that protection of possession is necessary, as the protection of the right to property. The law of property makes various provisions to protect possession of a thing by a person.

C. ELEMENTS OF A VALID POSSESSION:

Possession usually exist both in fact and in law with the same person. The fact of possession is called **de facto possession or corpus possessionis** and the possession in law is called **de jure possession or animus possidendi.**

Sometimes the possession may **exist in fact, but not in law.** For e.g., agent possessing principal's property, servant possessing master's property, seller after sale possessing buyer's property etc.

Sometimes possession may **exist in law, but not in fact.** For e.g., when an agent possesses the principal's property, agent's possession is 'possession in fact' and principal's possession is 'possession in law'. This is also called **constructive possession.** Roman lawyers called possession in fact as ***possessio naturalis*** and possession in law as ***possession civilis.***

According to Salmond, possession involves **two** distinct elements:

1. The mental condition or animus possidendi
2. Physical relation or corpus possessionis (possidendi).

Possession is the union of these two elements. If any one element is absent, then the possession is invalid.

1. ANIMUS POSSIDENDI (POSSESSION IN LAW)(DEJURE POSSESSION):

It is the mental element necessary to constitute possession. One must think that the things possessed

can be used only by himself without disturbance or interference by others.

Characteristics of Animus Possidendi:

a. The animus Possidendi must have **exclusive claim**. It means that third persons should be excluded from using it.

For e.g., A may possess a land, B can have an easementary right. Here, A cannot exclude B absolutely out of land, but he can exclude B (except easementary right) and all others from interfering in his use of the land. Such a claim of exclusive use by A is sufficient to constitute the mental element of the Animus Possidendi.

b. The mental element **need not amount to ownership**. For e.g., a lessee or mortgagee, though not the real owner, may have valid possession.

c. The mental element **need not have legal right**. It may be illegal. For e.g., a thief has a real possession as the lawful owner except the real owner, since he has got the Animus Possidendi.

d. The animus Possidendi **need not be specific and particular**, it may be general.

For e.g., a fisherman does not know how many fish are caught in his net. Still he has the mental intention to use all the fish in the net. Here, the mental intention is not specific, since the number of fish may vary from 0 to 1000 or more.

e. The mental intention **need not be over one's own property**.

For e.g., a servant may have the intention to use a thing on behalf of his master and an agent on behalf of the Principal. Here, the property does not belong to the servant or agent; still the Animus Possidendi or his mental intention is valid.

2. Corpus Possessionis (Possession in fact):

It is the fact of physical possession and physical element of possession. It is the fact observed by others. The fact is that the possessor exercises claim of exclusive use. He has got physical control and exclusive use of a particular property. There are **two** sub-elements which constitute the Corpus possessionis: They are:

a. The relationship of a possessor to other persons or third persons.

b. Relationship of a possessor to the thing possessed.

a. Relationship of possessor to other persons:

The possessor should have **strong physical possession**. This is called ***de facto possession*** or dominion over the thing possessed and it is measured in terms of the chances and degree of effective opposition to such possession.

If the following circumstances exist, then it indicates the strong possession of the possessor:

1. The possessor is in a position to exclude interference of others and use the property exclusively for himself.

2. To show the physical power of possession, the personal presence of the possessor is unnecessary.

3. The established usage of the property shows the physical security and possession of the possessor.

4. The possessor keeps the property safely including the power to hide it.

5. The possessor uses the property openly.

6. The third parties respect the possession of the property by the possessor, because of its lawful acquisition by him.

Bridges Vs. Hawkesworth:

An unknown person lost a parcel of currency in a shop. Later, one Hawkesworth who visited the shop picked up the currency parcel. The shop keeper contended that the currency parcel belonged to him. The Court held that the shop keeper had no Animus Possidendi and therefore the parcel would vest with Hawkesworth.

Under English Law, the possessor of land is also the possessor of the things attached to or under the land.

South Staffordshire Water Works Company Vs. Sharman:

The defendant who cleared the pond of the Plaintiff found three gold rings on the bed of the pond. He claimed them as ***Res Nullius*** (ownerless thing). The Court however held that the plaintiff being the owner of the land had the right of possession of the rings. It was

immaterial whether the owner had knowledge of the existence of things in the land. According to Salmond, a servant or agent cannot have possession as he finds the things not for himself but for his employer.

In Re Cohen:

Cohen and his wife lived in a house owned by Cohen's wife. After the death of Cohen and his wife, a large sum of money was discovered in the House. There was no evidence as to whom it belonged. Since Cohen's wife was the owner of the house, the Court held that the money should go to her heirs.

b. Relationship of possessor to the thing possessed:

1. In order to constitute possession, the possessor must have **some capable relationship** with the thing possessed. There should not be any barrier or interference with the thing possessed by the person. If there is no such capable relationship, an Animus Possidendi is not effectively present.

   For e.g., fisherman gets possession of fish only when the fish are secured in his net.

2. Once the possession is lost and if it cannot be got back or expenses of getting back is far high, then the possession is deemed lost even though Animus Possidendi is present.

   For e.g., when a bird escapes from the cage and when money is dropped into the sea, they are almost lost forever. Though Animus Possidendi is present in these cases, it shall be deemed that possession is lost.

3. If there are chances to get the lost thing back, then the possession is not lost.

For e.g., A may possess a land through his Agent, and still A is the legal possessor. What is necessary is guarantee of control between the person in possession and the thing possessed.

D. MODES OF ACQUIRING POSSESSION: (ACQUISITION OF POSSESSION)

The following are the **three** modes of acquiring possession:

1. Taking 2. Delivery 3. Operation of Law

1. Taking (Adverse Possession):

It is the act of acquiring possession without the consent of the previous owner. In other words, the thing must be taken with the necessary animus and without the consent of the owner.

Examples:

i. When the tenant wants to run away from the house without paying the rent, the forcible taking of tenant's things without tenant's consent, is a rightful possession.

ii. A thief may steal and acquire legal possession of a thing, though his taking of the thing may be illegal.

iii. Catching a fish in sea is taking under rightful possession.

2. DELIVERY:

When a thing is gifted or loaned, the transferor voluntarily relinquishes his possession and the transferee gets legal possession. Thus it is the act of acquiring possession with consent of the previous possessor.

The delivery may be of **two** types (i) **Actual delivery** - where there is transfer of immediate possession, (ii) **Symbolic delivery or Constructive delivery** – where the delivery of the key of a car or house is the delivery of the car or the house itself,

3. OPERATION OF LAW:

i. When a person dies, the possession is transferred from the deceased person to his legal heirs.

ii. When a person is declared insolvent, his properties vest in the Official Assignee.

iii. In both the cases, the transfer is by operation of the law.

E. POSSESSORY TITLE:

Possession is a prima facie evidence of ownership. Only a person having a better title or better possessory right can rightfully disturb the possessor.

Possessor can get ownership right by obtaining control of property - ***res nullius*** (no man's property). He can also become a owner by using and

possessing a property for a specified period of time (20 years) as prescribed by law. This is called **prescription**. Such a title of the possessor is called 'Possessory title'.

According to **Bentham**, actual possession is a title to a property and is called a **possessory title**, which precedes all others. It is a good title against every person who has no better title to oppose it. So any possession is a legal possession against a wrongdoer or an inferior title holder.

The law is that the possessor of property has a good title as against every stranger. Only a superior title holder can claim possession from the possessor.

F. POSSESSORY LIEN:

Lien is the right to retain possession of movable property until his debt or price or any sum due to him is recovered from the other person. It is a security for the possessor for recovery of debt or any payment due to him.

Bankers, agents, bailees, unpaid vendor's have the right to retain goods as a security for the amount due to them. This type of lien is called **possessory lien**.

G. POSSESSORY REMEDIES RIGHTS OR POSSESSORIUM:

I. POSSESSORY REMEDY AGAINST OWNER:

Generally, the owner of a thing is also its possessor, but sometimes, the possessor may not be the owner. Even

then, the owner cannot disturb his possession. The owner's remedy is only through Court or other legal means. He has to establish his superior title to the property before he can recover possession from the possessor.

This provisional protection of the possessor even against the owner of the property is called possessory remedy or possessorium to the possessor of the property.

II. POSSESSORY REMEDY TO THE POSSESSOR LOSING HIS POSSESSION:

If a possessor loses his possession by illegal action of other person, whether such other person is the owner of the property or other wise, the loser can bring a suit in a Court of law within **six months** from the date of possession.

In the Court proceedings, he need not adduce any evidence of his title to the property. Even then, his possession will be restored merely on the ground that he was in actual possession of the property on the date of illegal removal of possession.

Justification for possessory remedies:

1. The provisional protection of the possessor is to prevent the violent acts involved in the process of removal of possession from the possessor by the owner and also the availability of quick legal remedies and in some cases the owner's difficulty in furnishing proof of ownership.

2. Public order and safety require that no one should be allowed to take the law in his own hands.

3. In the olden days, documentary evidence was rare. Possession was considered to be the evidence of ownership.

4. Adverse possession of property gives right of ownership to the possessor against the original owner.

H. DIFFERENCE BETWEEN POSSESSION AND OWNERSHIP:

1. Possession is the relation between a person and an object in the context of his society. It is primarily a matter of fact.

   Ownership is not a factual relationship but of certain legal rights. It is a matter of law and not fact.

2. Ownership and possession may have the same subject-matter. Whatever may be owned may be possessed, and whatever may be possessed may be owned.

3. There are many rights which can be owned but cannot be possessed. These are termed 'Transitory Rights'. For eg., a creditor does not possess a debt but he has a right to claim the debt as owner of the debt money.

I. CONCLUSION:

Whether the possession is corporeal or incorporeal, the two elements namely Animus Possidendi and Corpus Possessionis are essential to constitute a valid possession.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain "Possession" with particular reference to immediate and mediate possession. Add a note on the following: (a) Concurrent possession (b) Actual delivery*
2. *Explain the concept of possession in law and state its importance.*
3. *What do you understand by the term possessory remedies? Give reasons for recognising such remedies.*
4. *a. What is meant by possessory title?*

   b. Point out the importance of possession.
5. *Define "Possession" and distinguish between:*

   a. Mediate and immediate possession

   b. Possession in fact and possession in law
6. *a. Explain the importance of possession even without ownership.*

   b. State the possessory remedies.
7. *The two constituent elements of possession are "animus" and "corpus" - Elucidate.*
8. *Write short notes on: (a) Animus Possidendi (b) Corpus possessionis (c) Possessory remedies (d) Possessory lien (e) Possessory title (f)Acquisition of possession (g) Possession in fact and Possession in law h) need for protection of possession*

30. OWNERSHIP

(Definition, Rights, Kinds and Modes of acquiring ownership)

(IMPORTANT)

SYNOPSIS:

A. Introduction

B. Right of ownership and ownership of rights

C. Rights of owner

D. Definitions (Austin and Salmond)

E. Types of ownership

F. Difference between Sole ownership and Co-ownership

G. Modes of acquiring ownership (Property) (Acquisition of ownership)

A. INTRODUCTION/IDEA OF OWNERSHIP:

Ownership means the relation of a person with the right vested in him. In other words, it is a right to own a particular thing.

Ownership extends to all types of rights – proprietary rights, personal rights, right in rem, right in personam, right in re propria, right in re aliena, principal rights, accessory rights etc., Ownership also applies to liberty, power, immunity etc.

Thus ownership is a relation between a person and a thing and it is opposed to **two** other relations namely (i) Possession (ii) Encumbrance.

B. RIGHT OF OWNERSHIP AND OWNERSHIP OF RIGHTS/ IDEA OF OWNERSHIP:

Rights of ownership is different from ownership of rights. For e.g., the right of ownership of a piece of land includes ownership of many rights. E.g., Right to cultivate, right to dig a well, a right to lease or mortgage, etc.,

The right of ownership is the aggregate use of several rights. It is just like collection of drops of water, each drop being a right and the whole water in the container is the ownership. Drop is the same but the whole quantity of water changes its shape according to the size and shape of a container. In the same way, ownership also changes, but rights within the ownership remain the same.

C. RIGHTS OF OWNER:

The absolute rights of the owner are as follows:

1. The power of enjoyment.
2. The power of possession which includes the right to exclude others from interference.
3. The power to alienate i.e., sale, mortgage, lease, charge, exchange etc.,
4. Power to write a will to bequeath a property.

D. DEFINITIONS: (AUSTIN AND SALMOND)

1. Austin's Definition:

Austin defines ownership as a 'right available against the whole world, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration' over a determinate thing.

The following are the **three** characteristics of Austin definition:

a. It is unrestricted in use of the property, i.e., without encumbrances.

b. It is unrestricted power to alien/dispose of the property as of his will and pleasure.

c. It is indefinite and unlimited in point of duration.

Criticism to Austin's definition:

a. Unrestricted in use of the property, i.e., without encumbrances:

The first essential of Austin's definition of ownership that it is indefinite in point of user is not correct. The right of use of a owner is not absolute and is subject to various restrictions.

E.g., every one has to use his land in such a way as not to harm others and their rights - such as absolute liability, nuisance, etc. Many acts impose restrictions on the free use of an owner.

b. Unrestricted power to alien/disposition of the property as of his will and pleasure:

According to Austin, the second essential element of ownership that unrestricted power of disposition is not also correct.

E.g., A minor, though owns properties, cannot transfer them. In the case of Hindu Joint families, the power of alienation exists in cases of legal necessities only.

c. Indefinite and unlimited in point of duration:

The third essential element of Austin's definition that ownership is unlimited in point of duration is also incorrect, because the ownership ends in duration in the following cases.

i. By death of the owner, or

ii. By insolvency of the owner, or

iii. By happening or non-happening of contingencies or

iv. By the Rule against perpetuity.

2. SALMOND'S DEFINITION:

Salmond defines the right of ownership in a material thing as the general, permanent and inheritable right to the use of the thing.

The definition gives **three** characteristics to constitute ownership.

a. A owner has a general right to make use of his property as he pleases, but subject to legal restrictions. Ownership is thus a general right.

b. A owner has a permanent right which lasts till the material thing lasts.

c. The right of ownership is a heritable right. If the material thing exists even after the death of the owner, it has to survive to somebody. It is done by inheritance either by intestate or testamentary succession.

E. TYPES OF OWNERSHIP:

1. CORPOREAL AND INCORPOREAL OWNERSHIP: (SUBJECT MATTER OF OWNERSHIP)

The subject matter of ownership is divided into corporeal ownership and incorporeal ownership.

When the ownership is of a material thing, e.g., land, goods, etc., then it is **corporeal ownership.**

When the ownership is with regard to immaterial things, for e.g., reputation, domestic relations, trade mark, etc., then it is **incorporeal ownership.**

2. SOLE AND DUPLICATE OWNERSHIP:

When the ownership is vested with only one person, it is called **sole ownership**. When the ownership is vested with two or more persons, it is called **duplicate ownership.**

Duplicate ownership is again divided into:

a. Co-ownership
b. Trust and Beneficial Ownership
c. Legal and Equitable Ownership
d. Vested and Contingent Ownership
e. Conditional ownership

a. Co-ownership:

When the ownership is shared by more than one person, it is called co-ownership.

Two or more persons may at the same time have ownership of the same thing vested in them.

For e.g., partners are co-owners of their stock-in-trade lease of the premises of the debts. It is an undivided unity vested at the same time in more than one person. The co-ownership has been dissolved into sole ownership by the process known as partition.

i. Joint co-ownership ii. Ownership in common

i. Joint co-ownership:

It is common in Hindu Law. On the death of one co-owner (co-parcener), the whole right goes to the other co-owner and not to his legal heirs.

ii. Ownership in common:

It is common in business. On the death of one owner, the whole right goes to his legal heirs and not to the other co-owners.

b. Trust and Beneficial Ownership:

In this, a trust is created. A trustee is appointed to administer the property. He cannot destroy the property, but he may administer the property. The interest or benefit arising from the trust is enjoyed or used by some other persons called **beneficiaries**. The trustee and the beneficiaries are the duplicate owners of the trust property.

c. Legal and Equitable Ownership:

It exists in England only. If ownership is **recognised by law**, it is **legal ownership**. If ownership is **recognised by equity**, it is **equitable ownership**.

For e.g., when A agrees to sell some goods to B and if money is paid to A but the goods are not delivered to B, then B is the equitable owner and A is the legal owner.

d. Vested and Contingent Ownership:

i. Vested ownership:

When the title to property is complete, the ownership is called **vested ownership**. For e.g., in a sale, if the property is transferred with the title, then it is a vested ownership.

Vested ownership is an **inheritable right**. So even if 'C' dies during the life time of 'B', C's heirs will succeed to the property.

Vested ownership is also a **transferable right**. So, 'C' can transfer his remainder even during the life time of 'B'.

It is of **two** kinds: (a) Vested in Possession (b) Vested in Interest.

a. Vested in Possession:

If X gives his property to his son Y. Y gets not only title to the property but also immediate possession. This is "vested in Possession".

b. Vested in Interest:

a. If A gives his property to his wife 'B' for life and thereafter to his son 'C'. Both 'B' and 'C' get vested ownership simultaneously.

b. 'B' gets the vesting of the life estate and 'C' gets the remainder. 'C's vesting is not postponed till the death of 'B'. The vesting of the remainder takes place even during the life time of 'B', but there is a distinction. While 'B' gets immediate possession, C's possession is postponed until after the death of 'B'. This is called **Vested in Interest**.

ii. Contingent ownership:

When the title to a property depends on the happening of some future uncertain event, it is called **contingent ownership**.

The uncertain event may or may not happen. If the uncertain event does not happen, the contingent ownership fails.

For e.g.,

i. 'A' gives a property to 'B' as gift, if he attains the age of 20. 'B' may attain 20 years or die before that. It is an uncertain event. Ownership becomes complete if 'B' attains 20 years. Till then, he is a contingent owner.

ii. 'A' may write a will giving his property to someone or to A's wife for life and after that to N, if 'B' marries a girl 'C'. This is a condition in the will. So, it is a **contingent ownership**.

iii. Spes Successionis:

Contingent ownership is different from ***Spes Successionis.*** Spes Successionis means 'the chance of a person succeeding to the property of another'.

For e.g., 'A' has got a son 'B'. 'B' has a chance to get 'A's property only on the death of 'A'. As long as A lives, B will not have the property. Only on the death of 'A', 'B' can take the property. So, 'B' has got only a chance to get 'A's property. This is called ***Spes Successions***.

e. Conditional ownership:

If the transfer of ownership depends on fulfil any condition, then it is called conditional ownership.

The conditional ownership is divided into **two** types namely (i) Condition Precedent (ii) Condition Subsequent

i. Condition Precedent:

The condition on the fulfilment of which a contingent ownership becomes a vested ownership is called a **condition precedent.**

For e.g., 'A' gives property to 'B' provided he marries 'C'. This is a condition precedent by 'B'. If he marries 'C', his contingent ownership becomes vested ownership.

ii. Condition Subsequent:

A condition, on the fulfilment of which, a vested ownership is destroyed is called **condition subsequent.**

For e.g., 'A' gives property to 'B' subject to the condition that if he marries 'C', he will forfeit his property. 'B' gets vested ownership, but there is a condition of loss of vested ownership. So if 'B' marries 'C', the vested ownership gets destroyed.

F. DIFFERENCE BETWEEN SOLE OWNERSHIP AND CO-OWNERSHIP:

1. In sole ownership, only one person is the owner. In co-ownership, ownership is shared by more than one person.

2. Sole ownership has no divisions, whereas co-ownership is divided into joint co-ownership and ownership in common.

   Joint co-ownership arises in Hindu coparcenary property by survivorship among the coparceners.

   In ownership in common on the death of one owner, in his place is legal heirs stepping and become owners in the common property.

G. MODES OF ACQUIRING OWNERSHIP (PROPERTY): (ACQUISITION OF OWNERSHIP)

Property is acquired by the following **four** methods:

1. Possession
2. Prescription
3. Agreements
4. Inheritance

1. Possession:

The possession of a property gives right to a valid ownership. The possessor is the owner against all persons, except the real owner.

In the case of ***res nullius*** (a thing which belongs to no one) the first person gets the valid ownership. For e.g., fish caught in sea.

Owners are divided into **two** types:

a. Possessory Owner
b. Absolute Owner

The ownership of possessor is imperfect in the possessory owner and perfect in absolute owner.

2. Prescription:

It means the creation or destruction of right of ownership by the lapse of time. It has two effects.

Positive prescription: (Adverse Possession)

If the lapse of time **creates a right** of ownership, then it is called positive prescription. Thus, positive prescription is the investitive operation of lapse of time with possession. In other words, long possession creates rights.

For e.g., if a person possesses an easement for twenty years without owning it, then he begins, at the end of that period, to own and possess it.

Even if documents are lost, memory fails, witnesses die, an efficient substitue is the probative force of long possession. It also creates a conclusive presumption in favour of the person of rightful long possession.

The rights arising of positive prescription are Rights in rem.

Negative prescription:

If the lapse of time **destroys a right** of ownership, then it is called negative prescription.

So, a long possession creates a right of ownership. For e.g., if a person adversely possesses a land against its owner for twelve years, then he becomes the real owner.

Similarly, the creditors' failure to sue the debtor destroys his right to recover the debt after three years.

For e.g., If a person has a claim of debt against another person, but if it is unenforced till the lapse of three years, then there is negative prescription by which the right to claim the debt gets extinguished.

Sometimes, in a same case, the two forms of prescription namely positive and negative prescription may coincide. Through long dispossession of a property, one person loses his right of ownership whereas the other person through long possession acquires the property.

Sometimes, if a person may be in dispossession of property for over twelve years, but no single possession would have continuously possessed the property for twelve years. In such circumstances, who gets the right of ownership depends on the rules of acquisition and not on the rules of prescription.

Negative prescription is of two types namely **perfect negative prescription** and **imperfect negative prescription**.

i. Perfect Negative Prescription:

Here the principal right of ownership is destroyed by adverse possession of immovable property for a period of **twelve years**.

ii. Imperfect Negative Prescription:

Here the principal right of ownership remains in existence, but only the right of action is destroyed resulting in loss of remedy due to the expiry of limitation period.

For e.g., the right to sue on a promissory note is destroyed after the lapse of three year limitation period, but the fact of debt remains even after the expiry of limitation period

The prescription arises by long possession of twenty years and such possession gives ownership rights.

3. AGREEMENTS:

Ownership are acquired by agreements. Void and Voidable agreements.

An agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law.

Void agreement:

An agreement not enforceable by law is said to be void . A void agreement is an agreement which ceases to be enforceable by law. An agreement when originally entered into may be valid and binding on the parties. It may subsequently become void.

Voidable agreement:

Voidable agreement is an agreement which is enforceable by law at the option of one or more of the

parties thereto, but not at the option of other or others, is a voidable agreement. However, the agreement continues to be good and enforceable unless it is repudiated by the aggrieved party.

The agreements are further divided into **two** types:

a. Assignments b. Grants

a. Assignments:

Assignments are agreements which transfer the rights from one owner to another. For e.g., sale is an assignment.

b. Grants:

Grants are agreements which create limited new rights. For e.g., lease is a grant. The rule ***nemodat quod non habet*** *(no* one can give a better title than what he himself has) applies here.

4. INHERITANCE:

It is the method by which property is distributed on a person's death. The persons who get such property are called legal representatives. If the deceased leaves the property by a will, then the inheritance is known as testamentary succession.

The legatee after the death of the testator becomes the owner in the cast of testamentary succession.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *"Ownership is the absolute right of dealing with a thing as per will, provided we do not use it in any manner prohibited by the law"- French code. Explain.*
2. *Examine critically Austin's definition of ownership.*
3. *Distinguish between: (a) Trust and Beneficial Ownership (b) Vested and Contingent Ownership*
4. *Define 'Ownership' and distinguish between Trust and Beneficial ownership.*
5. *What is ownership? How does Austin define it? Distinguish between trust and beneficial ownership.*
6. *What are the modes of acquiring ownership? Point out the importance and requirements of prescription.*
7. *Write short notes on: (a) Trust and beneficial ownership (b) Sole ownership and co-ownership (c) subject matter of ownership (d) Mediate and immediate ownership*

31. PROPERTY

(THEORIES, DEFINITION AND KINDS)

(ENCUMBRANCES, SERVITUDES)

SYNOPSIS:

A. Introduction

B. Theories of concept of property

C. Definition of property

D. Kinds / Types of property (Subject matter of property)

E. Proprietary Rights

F. Modes of acquiring property (Acquisition of property)

A. INTRODUCTION:

Things existed in nature became property when they were appropriated by men for their exclusive use. Every thing on earth was originally ***'res nullius'*** (no man's property) and only the person who occupied a place first - became its owner.

B. THEORIES OF CONCEPT OF PROPERTY:

There are different theories regarding the concept of property. One theory concerns how property came to exist and the other theories justify the existence of property.

The following are the important theories:

1. **First theory** - The property came into being by taking control of a ***res nullius***. The person who occupied a piece of land or thing became the owner of the property. This theory is not fully correct.

2. **Second theory** - For proper development of man's personality, control over property is necessary. Control of property makes men free. The conclusion arrived from this theory is that in a society, every member should acquire property for his true self realisation by his own toil.

According to the second theory, property is the result of individual labour and ownership is granted to him for his hard work. This theory advocates that each man creates his own property which also acts as a reward for the work of a creator.

3. **Third theory** - It is considered that private property is a creation of the State. The State was a resultant of social and economic forces. The emergence of the State and the creation of private property were the effects of the social and economic forces.

4. **Fourth theory (The functional theory):** This theory lays down that property which is the result of effort or involves the giving of service is justifiable, but property which is an undeserved claim on the wealth produced by others is not justifiable. If property has to encourage production, then society should see that it is distributed on proper basis.

C. DEFINITION OF PROPERTY:

The term 'property' means and includes many things, as stated below.

Property includes both animate (living) or inanimate (non-living) things belonging to a person.

It includes legal rights also. Further it includes personal rights like person's life, liberty, reputation, state etc.,

In narrower sense, property means only proprietary (corporeal) right. E.g., Land, chattels, goods, cargo, shares, debts, copyrights, etc.,

In the study of Jurisprudence, property means only proprietary rights in rem, i.e., proprietary rights available against the whole world.

According to Austin, property denotes right of enjoyment, life interests, the whole of a man's assets, including both ***rights in personam*** and ***rights in rem***.

Blackstone describes property as "the sole and full dominion which a man claims over the things of the world to the exclusion of others".

In law, property is defined as a proprietary right in rem.

D. KINDS/TYPES OF PROPERTY: (SUBJECT MATTER OF PROPERTY)

There are **three** kinds of property called subject matter of property.

1. Corporeal and Incorporeal Property
2. Movable and Immovable Property
3. Real and Personal Property

1. Corporeal and Incorporeal Property:

It is divided into two types: (a) Corporeal Property (b) Incorporealproperty

a. Corporeal Property:

Corporeal property is the right of ownership on **material things** or tangible things, i.e., things that can be touched and seen.

b. Incorporeal Property:

All other rights except over a material thing are incorporeal property. Incorporeal property cannot be seen or touched and includes valuable interest in respect of **non material things** which law has recognised and gives special protection. E.g., trade marks, copyrights, good will, etc.

Incorporeal property may either be:

i. ***Rights in re propria*** over immaterial thing or

ii. ***Rights in re aliena*** over all things material or immaterial.

2. Movable and Immovable Property:

a. Movable Property:

Property that can be moved is movable property - like chairs, tables, books, etc. Further, every corporeal property which is not immovable is movable property. E.g., Goods, chattels, cargo etc.,

Rights over immaterial objects like a copyright, patent right, trademark, etc., are now classified as **residuary movable property**.

To call a property, there must be existence somewhere. Otherwise, it cannot be called a property.

For e.g., for intangible property like goodwill, it exits in the business place. For debts, its existence is at debtor's residence.

b. Immovable Property:

Property which cannot be moved is immovable property, e.g., land.

Immovable property involves the following **five** elements:

a. A determinate portion of the earth's surface.

b. The ground beneath the surface down to the centre of the earth.

c. The column of space above the surface and infinitum, but as per German Civil Law, the owner of the land has no right to prohibit acts which are far remote from the earth surface since they do not in any way affect his interests. For e.g., the flight of aircraft at reasonable height is not actionable.

d. All objects which are on or under the surface in its natural state. E.g., Minerals and natural vegetations. Even stones in a quarry are part of immovable property.

e. All objects placed on or under the surface with the intention of permanently fixing them thereto. For e.g., buildings, walls, foundations, etc., and things

permanently attached, but not things attached without any intent of permanent attachment. For e.g., carpets, fixed wall hangers, money burried underground, etc.,

The following are not immovable properties as according to Sec. 3 of the Transfer of Property Act 1882 - Immovable property does not include **'standing timber, growing crops or grass'**.

3. Real and Personal Property:

This division overlaps the classification between movables and immovables.

a. Real Property:

The law of real property is like that of 'immovable property' and it includes all other proprietary rights, whether they are 'in rem' or 'in personam'.

b. Personal Property:

The law of personal property is like that of 'movable property' and it includes chattels, cargo, goods etc.,

E. PROPRIETARY RIGHTS:

Property is defined as any proprietary rights in rem. Proprietary rights are divided into **two**:

1. ***Right in re propria*** (i.e., right of ownership over material things- called Corporeal Property).

2. ***Right in re aliena*** (i.e., right of ownership over all things whether material or immaterial - also called encumbrances.

1. RIGHT (JURA) IN RE PROPRIA:

In ancient days, the term 'property' was confined to material things. But now it extends to immaterial things like patent rights (new inventions), copyrights, trade marks, etc. These immaterial things can be owned and possessed.

2. RIGHT (JURA) IN RE ALIENA: (ENCUMBRANCES AND TYPES)

Encumbrances are liabilities attached to properties.

There are **four** important rights in re Aliena/ encumbrances under this:

i. Leases
ii. Servitude
iii. Securities
iv. Trusts

i. Leases:

It is a limited right to the possession and use of property belonging to another person. The person possessing and using the property has to pay rent to the other person.

The lessee can rightfully possess the property, though he does not own it. The lessor need not be a full owner of the property to be leased. For e.g., a mortgagee or lessee can create a further lease. Patent right, copy right, Government promissory notes can be leased. So, a lease is a right in re aliena meaning that, "subject to encumbrances".

ii. Servitude: (Easement)

Servitude is a right enjoyed by the owner of land over the lands of another. Servitude or easement is a right available against the world at large.

It is a right to a limited use of a piece of land without possessing it, for e.g., the right of way, right to light, right to passage, right to fishing in another man's property.

Servitude is different from lease. In lease, possession and iimited use are present, whereas in servitude, there is no possession, but only limited use of property.

Servitude thus is a fraction of a right of property of one belonging to another or others.

TYPES OF SERVITUDE:

Servitude is of **three** types.

1. Positive and Negative Servitude
2. Private and Public Servitude
3. Real and Personal Servitude

1. Positive and Negative Servitude:

a. Positive Servitude:

Servitude may be **positive** for e.g., a right of way over the neighbour's field.

b. Negative Servitude:

Servitude may be **negative** for e.g., prohibiting his neighbour from constructing a building in a manner so as to obstruct light and air to his house.

2. Private and Public Servitude:

a. Private Servitude:

Private servitude is vested in a specific individual or individuals, e.g., a right of way or light.

b. Public Servitude:

Public servitude is vested in the public at large or in some class of unspecified individuals, e.g., the right of the public to a highway over a private land.

3. Real and Personal Servitude:

a. Real Servitude:

A real servitude resides in the party having the servitude, as being the owner/occupant of a parcel of land.

b. Personal Servitude:

In personal servitude, a person is not the owner or occupant of a given parcel of land.

Servitudes may also be classified as **continuous or discontinuous, rural or urban** and **apparent or non apparent.**

iii. Securities:

It is an encumbrance to ensure the fulfilment to some liability, usually the repayment of a debt.

Security may be of **two** types:

a. Mortgage:

It is an interest in property created for the purpose of securing the payment of a debt. The property is released when the debt is repaid. The right of the mortgagor for the release of the property is called the right of redemption.

b. Charge or Lien :

It is a security which does not amount to an interest in the property. It is inseparable from the debt. Once the debt is discharged, the charge ceases to exist.

Salmond calls the charge as **'lien'**. The charge means a charge on a specific property. Floating charge is created generally over the liquid assets of a person and such assets vary from time to time.

iv. Trusts:

Property vests in one person for the benefit of another, the former being under a legal obligation to use his ownership for benefit of the latter. Such property vesting in a **trustee** for the benefit of the **beneficiaries** is called a **trust.**

F. MODES OF ACQUIRING PROPERTY: (ACQUISITION OF PROPERTY)

(Refer Chapter No. 30, Page No. 263)

Sub heading - 'Modes of acquiring ownership')

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the various theories regarding the concept of Property.*
2. *Explain corporeal and incorporeal property.*
3. *Incorporeal property is either Right in re propria on Right in aliena - Comment.*
4. *Write short notes on: (a) Real and personal property (b) Kinds of property (c) Acquisition of property (d) Movable and immovable property (e) Theories of concept of property*

32. TITLE OR VESTITIVE FACTS

(MODES OF ALIENATION OF TITLES)(AGREEMENTS)

SYNOPSIS:

A. Introduction

B. Kinds / Types of titles

C. Modes of alienation of titles

A. INTRODUCTION:

A title is the source of a right. It is any fact by which a right becomes vested in a person i.e., the fact is called vestitive fact. So a title is a vestitive fact i.e., by a fact, a right gets vested in its owner. A title is the link between a person and an object. It is the evidence of right to ownership of property.

For e.g., if A owns a car, the law gives him a right of ownership over the car and it does not give a similar right over the car to any other person. It is because of the existence of certain facts (register certificate in the name of A) in A's favour. Such facts in favour of A is called the title of A to the car.

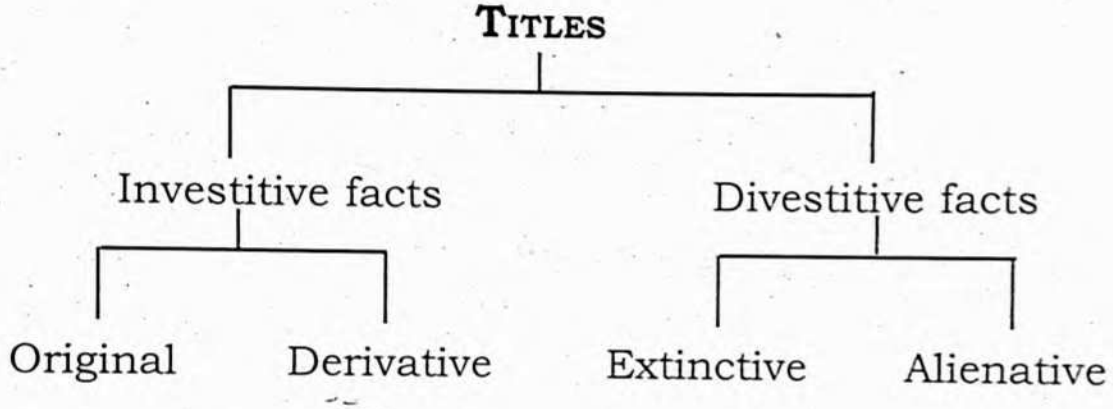
Vestitive facts are described here under -

VESTITIVE FACTS:

Facts create right. They also transfer and destroy rights. Such facts are called **'vestitive facts'**. A title is a set of vestitive facts which cause a right to be vested in a person.

For e.g., A pays money to B for purchasing B's house. A gets the sale deed executed by B. B sells the house to A by means of the sale deed. The sale deed is registered in the Registrar's office. The above facts are the title of A to the house. Because of the title, A gets the right of ownership to B's house. The right is vested in A.

B. KINDS/TYPES OF TITLES:



Vestitive facts or titles create new rights or transfer existing rights of one owner to a new owner.

Vestitive facts (title) is of **two** kinds:

1. Investitive facts
2. Divestitive facts

1. INVESTITIVE FACTS:

It is of **two** kinds:

a. Original title
b. Derivative title

a. Original Title:

The original title creates a right for the first time.

For e.g., when a person catches some fish in the sea, he becomes the owner, and the fish belonged to no one before that. It is a thing which had no owner. Such things which have no owners are called ***Res Nullius*** (nobody's property). Title is got for the first time by the person who catches the fish.

b. Derivative Title:

When the title transfers the right of one person to another, then it is called derivative title.

For e.g., sale, gift of fish in the above example.

2. Divestitive Facts:

Divestitive facts or titles are divided into **two**:

a. Extinctive Facts or Titles
b. Alienative Facts or Titles

a. Extinctive Title:

It extinguishes or destroys the right by itself.

For e.g., when a person has advanced a loan, he gets some title for such advancement of loan. The repayment of such loan destroys the right.

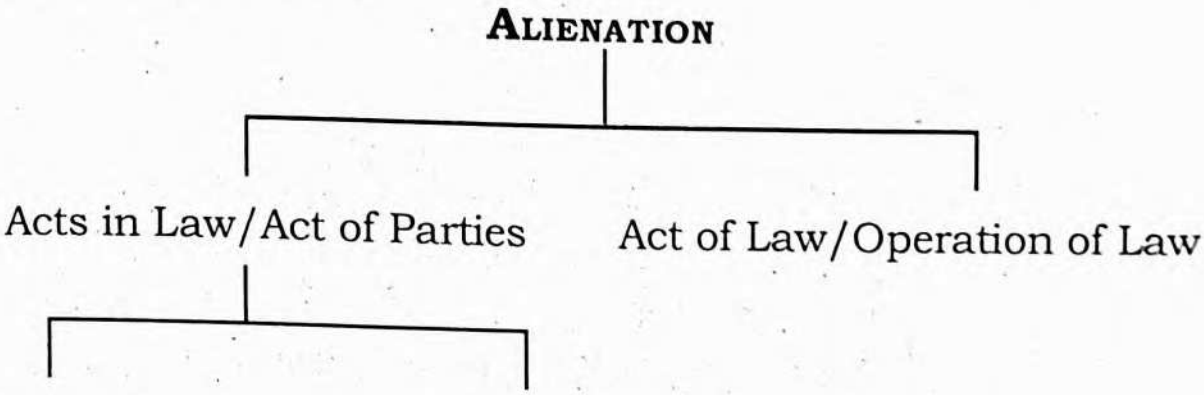
b. Alienative Title:

It transfers a right or alienates a right to some other person.

For e.g., sale or gift.

C. MODES OF ALIENATION OF TITLES:

The alienation (transfer) of titles are of by the following modes:



1. Contracts
2. Grants
3. Assignments
4. Release

Title or vestitive fact may take place voluntarily by the **act of the parties** or **by operation of the law**.

I. ACT IN LAW/ACT OF PARTIES:

Those which take place voluntarily are **acts in the law**.

For e.g.,

a. Capturing wild animal creates a new right.
b. Selling a property causes a transfer of right.
c. Destroying an object is destruction of a right.

Act of the party may be either unilateral or bilateral.

a. Unilateral acts:

It is an act of one party in relation to the other party concerned, it is again of **two** kinds.

In certain cases, they operate, though the other party dissents to such act of the other party.

E.g., exercise of a mortgagee's power of sale unilaterally without the mortgagor's consent.

In some other cases, it is subject to the dissent of the other party who is affected by it, though it does not require his consent e.g., bequest by a will without the consent of legatee.

b. Bilateral acts: (Agreements)

Bilateral acts involves acts of two parties. Bilateral acts in law are called agreements.

i. Essentials of agreement:

Agreement involves the consent of two or more persons, e.g., a contract, mortgage, lease, etc. The parties to the agreements adjust their rights and liabilities mutually by giving their free consent. It is a private declaration of the legal rights and duties between the parties. Almost all types of rights are created, transferred or extinguished by agreement of the parties.

ii. Types of Agreements:

Agreements may be divided into **three** types:

1. Agreements creating rights:

a. A **contract** is an agreement which creates a personal legal obligation between the contracting parties. Thus in a contract, legal relationships are established between the parties.

b. A **grant** is an agreement by which rights other than contractual rights are created, e.g., leases, mortgages, charges, licenses, etc.

2. Agreements transferring rights:

These agreements transfer rights and are called **assignments**. e.g., sale or gift.

3. Agreements extinguishing rights:

These agreements extinguish right and are called release, surrender or discharge.

iii. Causes invalidating agreements:

A valid agreement is **fully operative and enforceable at law.**

Invalid agreements may either be **void** (no legal recognition) or **voidable** (invalid) at the option of one of the parties to the agreement.

A void agreement does not receive any legal recognition or sanction. It is totally invalid.

For e.g., minor agreement, bilateral mistake, illegal agreements, contracts opposed to public policy, etc.,

A voidable agreement arises by reason of some defect in its origin. It is liable to be cancalled or nullified at the option of one of the parties to the agreement.

For e.g., fraud, misrepresentation, coercion, undue influence, unilateral mistake, etc.,

The **important causes for invalidating the agreements** are as follows:

1. No consideration:

A contract results when a promise is made in exchange for **'some thing in return'**. This 'something in return' is called consideration (quid pro-quo). Consideration is the **price for the promise** made by the promisor. So, every valid contract must be supported by consideration.

Thus, consideration means something which is of **some value** in the eye of law moving from the plaintiff.

Consideration implies something of value given, done or promised by one party in return for a promise of the other.

An agreement made without consideration is void. So, for every contract, there must be a valid consideration for enforcing it a Court of law.

According to Salmond and Winfield **'a promise without consideration is a gift, one made for a consideration is a bargain'**.

The rule is known by the latin maxim ***'ex nudo pacto non oritur actio'***. It means that nothing arises out of a nude contract. It is also called **Nudam Pactum.**

Thus, an agreement made without consideration is void, except in a few cases, where it is valid.

2. Absence of formalities:

Simple agreements may be in any form and merely requires consent from the parties. It may be oral, need not be registered, sealed, etc.,

On the other hand, formal agreements require some legal formalities, e.g. written agreement, signature of the parties, registration of agreement etc., These formalities are compulsory and hence non compliance invalidates such agreements.

3. Illegality:

Certain agreements are declared by law to be illegal.

E.g.: Agreements which are immoral or against public policy, wagering contracts, agreements in restraint of trade etc.,

4. Coercion/Undue influence/Fraud:

When the consent to an agreement is obtained by undue influence, coercion or fraud, then the agreement becomes voidable.

5. Error or Mistake:

When both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, then the agreement becomes void. This is also called essential error which means that the error is of such a nature as to prevent the existence of real and free consent. Consequently there is no real and valid agreement.

Unessential error on the other hand does not relate to a nature or contents of the agreement, but only to certain circumstances which induced the parties to make the contract. So unessential error does not affect the validity of the agreement, provided there is no misrepresentation by the other party.

6. Incapacity:

Some persons cannot in law determine their rights and liabilities by way of agreement.

E.g.: Minors, lunatics and convicts.

II. Act of Law/Operation of Law:

Here titles take place by act of law/operation of law of the country.

For e.g.,

a. If the Court orders the construction of a wall in a property, it is **creation of a new right**.

b. If the creditor gets possession of a thing in execution of a decree, it is **transfer of a right**.

c. If the Court orders the destruction of a wall, it is **extinction of a right**.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *"The title is de facto antecedent of which the right is the de jure consequent" - Salmond. Comment.*
2. *Facts are either investitive or divestitive - Comment.*
3. *Explain the methods by which title is created, transferred or extinguished.*
4. *Explain the nature of 'Title'? How is it related with the vestitive facts?*
5. *Explain vestitive facts.*
6. *Write short notes on: (a) Vestitive facts (b) Acts in law and acts of law*

33. PERSONS KINDS AN D STATUS OF PERSONS

(ANIMALS, UNBORN CHILDREN, DEAD PERSONS, FIRMS ETC.,)

(DOUBLE CAPACITY AND DOUBLE PERSONALITY)

(IMPORTANT)

SYNOPSIS:

A. Definition of person

B. Kinds of persons

C. Legal personality

D. Double capacity and Double personality

E. Legal status of animals

F. Legal status of unborn children (Child 'enventre sa mere')

G. Legal status of dead persons

H. Legal status of a firm

I. Legal status of unincorporated associations

J. Legal status of a Hindu Joint Family

K. Legal status of corporation or company

L. Legal status of State (State as a person)

A. DEFINITION OF PERSON:

Salmond defines 'a person' as any being whom the law regards as capable of rights or duties.

Gray defines "a person" as an entity to which rights and duties may be attributed.

Any being which is capable of holding any right or duty whether it is a human being or not is a person in law.

B. KINDS OF PERSONS:

Persons are classified into **two** kinds namely:

1. Natural Persons 2. Legal Persons (Juristic Persons)

1. NATURAL PERSONS:

A natural person is a living human being. All human beings do not necessarily possess legal personality. E.g.: Slaves in ancient times, infants and lunatics in the present days.

2. LEGAL PERSONS (JURISTIC PERSONS):

It is any entity or subject matter to which the law attributes legal personality. Generally, legal personality is granted to all human beings living within the territory of the State. The law creates legal person by personifying some real thing, but personification does not always signify legal personality.

C. LEGAL PERSONALITY:

Legal personality is an artificial creation of law. All human beings do not possess legal personality. For e.g., in Roman law, slaves did not possess any legal personality. Similarly, minors and lunatics possess only a limited legal personality, but other entities enjoy full legal personality, e.g., a worshiping idol or a corporation or an unborn person etc.

According to Austin, human beings who have no rights are not persons. The term person denotes the **conditions or status** of men in the eye of law.

D. DOUBLE CAPACITY AND DOUBLE PERSONALITY:

1. Double Capacity:

A man can act in different capacities. If a man is employed in an organisation as an officer or an executive or an agent etc., then by virtue of such employment, he can act in the official capacity. However, he cannot use such official powers or capacity in his private capacity.

For e.g., a director of a company, as director, he has certain rights and duties which he cannot use in his private capacity. Similar is the position of partner, a trustee, and others. This type of exercising different capacities by a person is called **'double capacity'**.

2. Double Personality:

Though a man can have double capacity, he cannot have double personality. By using double capacity, he cannot file a case against himself. Similarly he cannot be a contracting party on both the sides of a contract and even if any such contract is entered by taking the role of double personality, it is void.

Since the rules applied to double personality transactions are very strict and rigorous, some exceptions were made which are as below.

3. Exceptions:

i. A creditor can be a debtor's executor.

ii. If the other contracting parties are a group of persons like associations, clubs etc, then the first contracting party can be a member in such group.

iii. For use of objects, a person can convey a thing to himself as per the "Statute of uses".

E. LEGAL STATUS OF ANIMALS:

In ancient Criminal law, animals were regarded as the subject of legal duty and were punished for crimes.

In modern systems of law, animals are not personally punished for any wrong done by them, but under the principles of vicarious liability and strict liability, their masters are held liable.

Animals have neither rights nor duties and therefore are incapable of having a legal personality. Though Law prevents cruelty to animals (duty entrusted to the society), there is no corresponding legal right in the animals. The right is only vested in the public at large.

An animal cannot also have proprietary rights. Animals cannot own property and cannot be punished for committing a crime. Killing of animals for food is also not a crime. Hence they are not legal persons. The animals owe duty only to the owner and to the society sometimes, but in the eye of the law, they are mere objects and not persons. Animals are owned by men just like any other movable properties.

F. LEGAL STATUS OF UNBORN CHILDREN: (CHILD 'ENVENTRE SA MERE')

Children in the uterus and even children not yet conceived have legal personality. Unborn persons can be the subjects of rights which are contingent upon their birth. The ownership of contingent rights become vested ownership only when the child is born.

A child in the mother's womb is known by the latin maxim **'enventre sa mere'** and it is regarded as born and a gift may be made to the child in the womb. In Hindu Law, if partition is made without allotting a share to a child in the womb, as if the child existed on the date of partition, the partition will be set aside. Injury to a child in the womb and causing miscarriage are punishable under the Indian Penal Code.

Rights can be created in favour of unborn persons by trust or by vesting the property in some persons till the unborn person comes into existence. Rights in favour of the unborn person is governed by the Rule against Perpetuity.

Thus, unborn persons are recognised as legal persons eventhough their rights are contingent upon their birth.

G. LEGAL STATUS OF DEAD PERSONS:

Generally, dead persons cannot exercise any right. All the rights in the world go off with their death. So, they are not legal persons. However, they are entitled to the following rights:

a. A right for a decent burial. If any person hinders the taking away the dead body to the burial ground, it is an offence punishable under the I.P.C.

b. Every person has a right to save his body from anatomical dissections.

c. Dead persons have reputation. If anybody makes any defamatory statement about a dead person, then he can be punished for defamation under the I.P.C.

All the three instances appear to give some rights to dead persons, but they are not actually so. Rights are given not in the interest of the dead person, but only in the interest of the society and his (dead person's) relatives.

Defamation to a dead person is defamation to his/her relatives also. So, dead persons are not legal persons.

H. LEGAL STATUS OF MINOR

In law, a minor is a person under a certain age i.e., below the **age of majority.** The age of majority differentiates **childhood** from adulthood. In law, minor is a natural person and also a legal person.

He can become an agent under law of agency. He can be admitted to the benefits of partnership under the Partnership Act. He is entitled to his share in partition. He is entitled to fundamental rights and basic human rights. Depending on his age (during minority period) he can be punished for the offences committed by him.

However, he has the following disabilities. He cannot enter into any contract. He cannot vote, nor marry legally. He cannot write a will. All his legal acts are entered through his is natural / legal guardian. He has property rights, but all such rights can be exercised through the guardian only.

I. LEGAL STATUS OF A FIRM:

A group of partners in a commercial undertaking is referred to collectively as a firm. In law, however the firm has no existence apart from the members constituting it.

A suit cannot be instituted in the firm's name but only in the names of all the partners comprising the firm.

I. LEGAL STATUS OF UNINCORPORATED ASSOCIATIONS:

A social club, professional body, trade union, society come under the category of unincorporated association. It is represented by the total number of members constituting it. The size of the association may be small or big.

Its rights and duties are simply the rights and duties of its members and nothing more. The rules of unincorporated associations constitute the basic contract for all their members. The property owned by it is the joint property of all its members. The conduct of members is governed by its own rules.

However, the expulsion of members are regulated by legal rules and rules of natural justice.

J. LEGAL STATUS OF A HINDU JOINT FAMILY:

Hindu joint family is a creation by **sue generis** (birth right). It is a legal person. The Kartha of the Hindu Joint Family is the representative of the Hindu Joint Family. The Hindu Joint Family can acquire, own, enjoy

and dispose of property. The property of Hindu Joint Family is called co-parcenary property.

The persons who have right to the co-parcenary property are called **co-parceners.** The income of Hindu Joint Family is taxable under separate head of income. The Hindu Joint Family can sue and be sued.

K. LEGAL STATUS OF CORPORATION OR COMPANY:

(Refer Chapter No. 34, Page No. 299)

L. LEGAL STATUS OF STATE: (STATE AS A PERSON)

The State is a large social organisation. It owns huge assets and performs various functions to her subjects. Whether a State is a corporate personality or not and whether it is recognised as a legal person by law or not are important questions to be decided.

State is regarded as a Sovereign. The State has both assets and liabilities. It can own, transfer etc of all her assets.

Article 300 of the Constitution of India provides that the Government of India may sue or be sued in the name of the Union of India and the Government of each State may sue or be sued in the name of the State. So, in India, the State is a legal person.

However, in England, the State is not a legal person. The Government in England has monarchical rule by a King. The King is a natural person and a corporation sole in which character he holds all the powers and prerogatives of the

Government. The State has no independent rights or duties and hence legal personality is not recognised for the State in England.

M. STATUS OF LUNATICS (INSANE PERSONS):

a. Meaning :

Any person who is mentally afflicted (includes lunatics and drunk persons) at the time of entering into a contract is incapable of doing so.

The burden of proof here falls on the mentally afflicted person themselves, ie., on the lunatic.

b. Insanity :

1) The term 'insanity' is the state of mind wherein a person behaves irrationally out of mental derangement.

2) Legal Status of Insanity as per the Judicial system has been as a person labelled insane is in a state of incapability of differentiating between right or wrong.

3) A person who is insane is considered to be suffering from certain mental ailment which makes him lose reasoning to the point that their actions cannot be anticipated by others.

4) According to the Indian Judicial system, an insane person has distinct status in the society.

5) The WHO in 1996 developed the Mental Health Care Law with 10 basic principles to protect or regulate the rights of mentally disabled people.

c. Rights, restrictions and privileges of an insane person by Law:

1) The Constitution of India entitles mentally ill people with the fundamental rights which are guaranteed to each and every citizen, to the extent that their disability does not prevent them from enjoying those rights or their enjoyment is expressly or impliedly barred by the Constitution or by any other statutory law.

2) Article 21 of the Constitution of India depicts the maintenance and improvement of public health. The right to life under the ambit of Article 21 means more than just the survival of human being.

3) The Supreme Court through a number of landmark judgments speaks the right to live with human dignity in humane living conditions and right to health.

In the context of mentally ill person, all such rights are provided including right to live in the society along with other citizens, work as far as possible and also to lead a normal family life, while protecting them from exploitation.

d. The Mental Health Care Act, 2017:

1) Definition of Mental Illness

The Mental Health Care Act, 2017 has defined mental illnesses as a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, and capacity to recognise reality or ability to meet the ordinary demands of life.

2) Mental Illness also includes mental conditions associated with the abuse of alcohol and drugs.

3) Rights conferred on a mental illness person (lunatic)

The Mental Health Care Act of 2017 confers the following rights of a mentally challenged individual- lunatic in India.

i) The right to make a directive with respect to the way the insane person should be treated or to appoint a nominee for conducting duty of taking decision on his behalf.

ii) The right of a lunatic to access healthcare services and specifically right to access such services free of cost.

iii) The other specified rights under the Act are

- right to equality and non-discrimination,

- right to information and confidentiality,

- right to legal aid and complain and

- right to live in a community.

iv) In the very recent judgment of "Accused X vs State of Maharashtra", the Hon'ble Supreme Court held that 'every person with mental illness shall have a right to live with dignity'.

e. The Indian Contract Act, 1872:

The Indian Contract Act, 1872 states that mentally ill persons cannot give valid consent for a legally binding contract, because of their incapability to understand the nature of the contract and to form a rational judgment. Hence, they do not have the capacity to enter into a valid contract except during lucid intervals.

f. The Representation of People Act, 1950:

The Representation of People Act, 1950 invalidates the right of a person with mental incapacity to vote or hold public office under the Indian Constitution, provided that such mental incapacity has to be declared by a competent court.

g. The Hindu Marriage Act, 1955:

The Hindu Marriage Act, 1955, The Special Marriage Act 1954 and similar provisions of in laws of other religions incapacitates a person suffering from mental illnesses to give a valid consent to marriage and under all these personal laws, such marriage is voidable though not void.

h. The Indian Succession Act, 1925:

The Indian Succession Act, 1925 considers that a mentally ill person cannot understand the nature of the testamentary document and hence the person cannot make a valid will, except during lucid intervals.

i. The Indian Penal Code, 1860:

1) The Indian Penal Code, 1860 considers that an unsound mind can have no criminal liability since 'mens rea' is missing in committing the offence. The defense of

insanity is thus a very prominent general exception granted to an insane person.

2) In 1843 the first legal test of insanity was codified in British law, through the M' Naghten case. The test relies upon presumption of sanity unless the accused proves mental illness to such extent that they are incapable of understanding their own actions. The irresistible impulse test which focuses on the incapability of self- control of accused due to a mental disease and the Durham Rule which states that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect are the other prevailing tests of insanity.

3) In India, insanity defense law, Section 84 IPC is solely based on the Mc Naughten rules and no changes so far have been made since it is drafted. Section 84 of IPC deals with the "act of a person of unsound mind." "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law".

4) Indian legal system is concerned with legal insanity and not with medical insanity.

5) In the context of burden of proof, the court in State of M.P. v. Ahmadulla, states that "under law, every man is presumed to be sane and assumed to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved".

j. Legal Status of Insanity:

Legal system considers that only a person who has been declared as an insane person by a medical practitioner as per established procedure and by a competent court of law lacks reasonableness and he has the legal status of a lunatic. However, he has the right to live a normal life in a society.

N. STATUS OF DRUNK PERSONS:

a. Meaning:

Intoxication is a condition in which a person's mental and physical state due to the consumption of alcohol or a narcotic substance is that of an insane person.

In this state of intoxication, the person is not able to understand whether what he is doing is right or wrong and he is unable to understand consequences of his or her actions. He is neither able to control his actions and he is not able to react in a particular way.

b. Contracts entered into by a drunken person:

1) A drunk person is incapable of entering into a valid contract. Generally the Contractual capacity of a drunken person is regarded same as that of one who is a lunatic. The burden of proving drunkenness rests on the person asserting it.

2) Contracts entered into by a drunken person are not binding on him in the following cases :-

i) When he is too drunk to understand the nature of contract.

ii) The opposite party takes advantage of it knowing of his condition.

c. Intoxication and criminal liability :

1) A person who is involuntarily intoxicated is not liable for commission of criminal acts whereas a person who is voluntarily intoxicated is liable for commission of criminal acts and he cannot take the defence of intoxication.

2) Legally, alcohol intoxication is defined as a concentration of alcohol in the blood greater than 5.4-17.4 mmol/L.

3) A person is excluded from criminal liability for reasons such as intoxication, insanity, consent, etc.

4) The burden of proof rests with the accused to prove that he has been forcibly administered with the intoxicating substance or he should not know that the substance given to him is an intoxicating substance.

5) The person should be intoxicated at the time or before the commission of such an offence.

7) He should not be aware of the consequences of the such an act that the act that he is doing is wrong or contrary to law.

Except when he is drunk to the extent that he does not know what he is doing Is wrong or contrary to law, in all other circumstances, he is considered as a normal legal person possessing rights and duties.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the concept of legal personality. Add a note on any of the following: (a) A child 'Enventre sa mere' (b) Dead man.*
2. *"In law, there are human beings who are not persons and persons who are not human beings". Explain, giving examples.*
3. *(a) What do you understand by the term "legal entity"?*

   (b) What is the legal status of a firm, unborn persons and animals?
4. *What is the legal status of animals, Hindu joint family, firm and an unborn person.*
5. *Write short notes on: (a) Dead man (b) Animal as a person (c) Corporation (d) Person (e) Unborn person (f) State as a person (g) Status of Lunatics (Insane persons) (h) Status of Drunk persons.*

34. NATURE OF CORPORATE PERSONALITY - THEORIES OR CORPORATION AS A LEGAL PERSON

(LEGAL STATUS, CIVIL AND CRIMINAL LIABILITY, ADVANTAGES)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Legal status of corporation

C. Civil and Criminal liability of corporation

D. Incorporation and its purposes, uses and advantages

E. Theories regarding the nature of corporate personality

f. Corporate social responsibility

G. Conclusion

A. INTRODUCTION:

Person is any being which is capable of holding any right or duty whether it is a human being or not.

Salmond defines 'a person' as any being whom the law regards as capable of rights or duties.

Gray defines "a person" as an entity to which rights and duties may be attributed. It is any entity or subject matter to which law attributes legal personality.

According to **Austin**, human beings who have no rights are not persons. The term person denotes the **conditions or status** of men in the eye of law.

B. LEGAL STATUS OF CORPORATION:

The corporation is a legal person enjoying in law the capacity of holding property. It is defined as 'a group or series of men which, by a legal conception, is regarded and treated as a person". It is the most important juristic person and recognised both in England and in India.

Corporation and its kinds:

A corporation is an independent legal personality with limited liability, perpetual succession, distinct from the members constituting it and can sue and be sued. It can own, transfer assets in its own name and it has a seal of its own.

There are **two** kinds of corporations:

1. Corporation Aggregate 2. Corporation Sole

1. CORPORATION AGGREGATE:

It is a body of human beings united for forwarding their certain interests. It is formed by a number of persons who become shareholders of the company and contribute money for the furtherance of a common object. Incorporation enables traders to trade with limited liability. Such a legal entity called the company is formed by the personification of the shareholders.

2. CORPORATION SOLE:

It is an incorporated series of successive persons which has only one member at a time. E.g., the Sovereign is a Corporation sole at common law,

Postmaster General, President of India, Vice Chancellor of a University are certain illustrations, who are endowed by Statutes with the nature of corporation sole.

Though the living official comes and goes, the corporation sole remains the same as ever, and thus the main purpose of the corporation sole is to ensure continuity. The occupant of the office can acquire property in the name of corporation sole for the benefit of his successors and may contract to bind or benefit them.

In law, a company is different from its shareholders. Similarly, the property of the company is not the property of the shareholders. The debts and liabilities of the company need not be bourne by its members.

Even if all the members become insolvent, the company can go on. Similarly, if the members remain rich, the company can become insolvent. The company may enter into contracts with its shareholders and vice versa.

All the above characteristics of a company shows that it is a legal person and not a natural person.

C. CIVIL AND CRIMINAL LIABILITY OF CORPORATION:

The authority of the representatives (directors) of a corporation is determined by law i.e., through memorandum of association and articles of association

under Companies Act. Any Act which is beyond the legal limits of authority is **ultra vires** and hence null and void.

In other words, the acts of the representatives must be for achieving the main/incidental objectives of the corporation. In all internal matters (indoor management of the company), if there are any wrongful acts by the representatives like fraud, libel, etc., then the company is liable.

The liability of the corporation is on the principle of vicarious liability i.e., master is liable for the acts of the servant in the course of employment.

D. INCORPORATION AND ITS PURPOSES, USES AND ADVANTAGES:

A group of persons who have common interests secure - by the act of incorporation, the power of protecting their interests through an organisation known as the corporation. Incorporation is thus the creation of an artificial legal person called corporation.

There are many uses and advantages of incorporation which are as follows:

1. Independent Corporate Personality:

A company is a legal person. Once the company is registered under Companies Act, it becomes independent and distinct from its members. It gains a corporate personality. A member cannot be held liable for the acts of the company even if he holds virtually the entire share capital.

The principles of Corporate Personality has the following important advantages:

i. The member of a company has no insurable interest in the property of the company.

ii. Even when the member dies, the company continues in existence. Only his share vests in personal representatives and not the assets of the company.

iii. The nationality of the company does not depend on the nationality of the member.

2. Limited Liability:

The main advantage of a company is its limited liability. The members are liable only to the extent of their shares in the company. Their personal properties are in no way liable for the debts of the company. It is both an encouragement for large capitals and increasing the wealth of the company.

3. Perpetual Succession and a Common Seal:

An incorporated company never dies. What is death is unknown to it. Members may come and go but the company goes on for ever. It enjoys legal immortality. It is created by law and so can be put to an end by a process of law.

Even a hydrogen bomb cannot destroy a company. The death or insolvency of all the company members cannot end the life of the company.

4. Transferability of Shares:

The capital of a company is divided into parts called "Shares". These shares can be transferred very easily. It is just like a movable property which can be sold in the open market.

5. Separate Property:

The company being a legal person can own and enjoy separate property in its own name. No member can claim the ownership of a company's properties.

6. Capacity to Sue and be Sued:

The company can sue and be sued in its own name. It can sue its members, creditors, debtors and outsiders and vice versa.

7. Dealing between Members and the Corporation:

Since the corporation is a legal person distinct from its members, dealing between the members and between the corporation and its members are possible. The members can sue the corporation and vice versa.

8. Corporate finances:

The shares of an incorporated company are freely transferable. So a company can raise maximum capital in minimum possible time. Further, it can raise its capital by public subscriptions either by way of shares or debentures.

9. Centralised management:

The shareholders who deposit money in the form of shares have no direct concern with the management of

the company. Independent functioning of managerial personnel attracts talented professional persons to work for the company and to achieve highest targets of production and management leading to company's overall prosperity.

10. Protection of investors against loss:

One of the main advantages of incorporated company is that it affords an opportunity to even a common man with meagre resources to invest a litte part of his income in the company's capital through purchase of shares or debentures and participate in a big business venture.

E. THEORIES REGARDING THE NATURE OF CORPORATE PERSONALITY:

1. Fiction Theory : (Legal Fiction)

The supporters of this theory are **Savingy, Salmond and Gray**. According to this theory, the personality of the Corporation is a **fiction of the law**. It is only introduced for giving the character and properties of individuality on a collective and changing body of men.

The idea of a corporation is that the individual members are not the subjects of the right, but the collection of individuals. By the change of an individual member, the unity or existence of Corporation is not affected.

A Corporation is far distinct from its members and capable of surviving even after death of the last member. This quality leads to the conclusion that a Corporation is only a fictitious creature of the law.

By the act of incorporation, the members secure for themselves the power of protecting their interests through the organisation. **Prof. Gray** is of the view "by fiction, an abstract entity called the Corporation is created and by a second fiction, the wills of individuals are attributed to it".

The fiction theory, though holds good, is criticised by the exponents of the realist theory.

2. Realist Theory:

This theory is supported by **Gierke, Lasson and others**.

This theory advocates that the right of a Corporation is **not a fiction but a reality**. The association of many persons produces a will distinguished from the separate members of the group.

According to this theory, only from the interpretation of the 'individual wills' of the members, the 'Corporation will' arises. "The Corporation is more real than the individuals, because it has greater complexity of parts and represents a higher form of evolution".

Salmond criticises that the Realist theory is inapplicable to a Corporation sole.

Gray points out that Corporation sole is not a fictitious or juristic person and is simply a series of natural persons, some of whose rights, are different and devolve in a different way from those of natural persons".

3. Bracket Theory:

According to this theory, juristic personality is only a **symbol to facilitate the working of the corporation**. Only the members of the corporation are "persons" and **a bracket is put around them to indicate that they constitute one unit**.

According to this theory, a corporate personality is the creation of arbitrary legal rules to facilitate proceeding by and against a corporation in a Court.

This theory is a failure, because it fails to indicate when the bracket may be removed and the mask will be lifted for taking note of the members of the corporation.

4. Concession Theory:

This theory says that juristic personality is a **concession granted by the State**, and it is the discretion of the State to recognise it or not. This theory resembles the Fiction theory, as it holds the view that the corporation has no juristic personality.

It is the 'State recognised fundamental right or freedom' to form associations, and hence the discretionary power of the State is very much curtailed. So, this theory is a failure in explaining the nature of Corporation.

F. CORPORATE SOCIAL RESPONSIBILITY:

Corporate Social Responsibility is defined as the voluntary commitment of businesses to include in their

corporate practices economic, social, and environmental criteria and actions, which are above and beyond legislative requirements and related to a broader range of stakeholders—everyone influenced by their activities.

Issues of sustainable development for the planet, for agriculture, and for our industry go well beyond business. These issues require active participation by corporate sector who can afford to spend to carry o the sustainable development to next generations.

Corporate Social Responsibility (CSR). defines specific roles and responsibilities for business persons.

The corporate sector should pursue those activities with a broader awareness of the system in which it operates. It should have thoughtful consideration and meaningful action toward environmental and social issues.

The United Nation's Global Compact, which asks companies to work within their sphere of influence towards human rights, labor rights, environmental responsibility, global warming and anti-corruption.

A comprehensive CSR program includes stakeholder analysis, comprehensive strategy design that includes workplace, marketplace, societal, and environmental dimensions, activation programs, and measuring and reporting.

Corporate social responsibility includes-

1. Understanding the context and issues within which it operates, making the best choices it can, and continually progressing its role (perspective).

2. Maintaining the desire to do better as an organization (leadership).

3. Establishing the structure/systems to ensure the intended impact (management).

4. Leveraging activities to bring value to the organization (communication).

5. More than anything, it is about commitment and that can be a difficult thing to cultivate in a business.

G. CONCLUSION:

CSR is now only just emerging as a precise activity and it has much room to grow.

Although the field of measurement of achievements has advanced significantly, it still remains difficult to accurately measure the impact of achievements.

The technical definition of CSR encompasses voluntary measures, which can be only by way of active contribution.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the legal personality of Corporation. Discuss the acts and liabilities of a Corporation.*

2. *Comment on the following: "A Corporation lives apart from its members".*

   a. Explain the "fiction" and "realist" theories of incorporation.

   b. What are the advantages of incorporation?

3. *Explain the concept of person in law and examine the nature of corporate personality.*

4. *Explain the concept of corporate personality and also explain the use and purpose of incorporation.*

5. *Explain how imposition of civil and criminal liabilities on a corporation aggregate is justified.*

6. *What is Corporate Social Responsibility? Explain.*

7. *Write short notes on: (a) Incorporation (b) Fiction theory (c) Legal fiction (d) Independent corporate personality. (e) Corporate Social Responsibility.*

35. LIABILITY (OR) JURISTIC ACT

(CLASSIFICATION)(INTENTION AND NEGLIGENCE-THEORIES & TYPES)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction
B. Austin's definition of act
C. Salmond's definition of act
D. Difference between the views of Salmond and Austin
E. Classification of acts
F. Intentional act or Intention
G. Negligent act or Negligence
H. Types of Negligence

A. INTRODUCTION:

The act of the doer is an important condition for penal liability and hence the term 'act' has to be understood clearly.

B. AUSTIN'S DEFINITION OF ACT:

Austin defines **an act** as **a movement of the will.** It is a bodily movement caused by volitions. A volition means a desire for a bodily movement. The bodily member must be in a normal condition.

Generally our bodies follow our wishes for certain movements. Such wishes are human volitions and the consequent movements are acts. The 'will' is the cause

or author of the volition and act. Such a will is defined as 'the physical cause by which the motor nerves are immediately stimulated'. The dominion of the will is limited to bodily organs.

DIFFERENCE BETWEEN ACT AND CONSEQUENCE:

An act is restricted to the bodily movement which follows upon a volition, and it is a voluntary muscular contraction.

Sometimes the act is willed, but the consequences are not willed.

E.g.: X shoots at Y, by firing the pistol. Here incident is willed but the consequences are not willed but intended.

To desire the act is to will it and to expect the consequences is to intend them.

C. SALMOND'S DEFINITION OF ACT:

Salmond defines an act, as "any event which is subject to the control of the human will". The difference between a mere event or movement of external nature and an act is very important. If there is no purpose, it is only an event.

E.g.: 'X" is jumping down from a building is an act, as it is done with a purpose. But 'X' falling from a building is an event, as it was not a movement followed with 'will'. So an act is a movement arising out of human will.

D. DIFFERENCE BETWEEN THE VIEWS OF SALMOND AND AUSTIN:

1. **Salmond** holds the same opinion as that of Austin in saying that every act follows a determination of the human will.

2. **Salmond** says that every act is made up **three** distinct factors - **origin, circumstances and consequences**.

But **Austin** limits the act to only origin and consequences. Salmond views that the circumstances and consequences are also the constituent parts of an 'act'.

E. CLASSIFICATION OF ACTS:

There are **four** types of acts.

An act in the Law is a juristic act. A juristic act is a manifestation of the will of a private individual and it is directed to the origin, termination or alteration of rights.

1. ACTS IN LAW AND ACTS OF LAW:

An act in law gives rise to duties that are voluntarily incurred.

The law sometimes binds a person against his will and imposes duties on him, irrespective of his will.

E.g.: A duty not to defame others.

2. Inward and Outward Acts:

Determinations of the will in mind are internal acts. Those determinations of the will that produce an effect upon the world are outward acts.

3. Positive and Negative Acts:

"An act of **commission**, from the will to do", is a **positive act**. An act of **omission** is called a **negative act** which is a forbearance.

4. mal and Negligent Acts:

An act which was foreseen and desired by the doer is an intentional act. An intentional negative act is forbearance. It is called an omission. An omission is the consequence of that state of mind called negligence, and there is absence of will and intention.

F. INTENTIONAL ACT OR INTENTION:

1. Austin's view of Intention:

According to **Austin**, intention is a particular state of mind of the doer of an act. A man is said to intend an act when he does the act with the expectation that certain consequences would arise from it.

2. Salmond's view of Intention:

Salmond criticises Austin's view that the essence of intention is not expectation, but only desire. Only if a person desires a thing, he is said to expect it.

E.g.: A surgeon undertaking an operation has knowledge that the patient would die and expects that the patient would die, but his desire is only to save him.

Salmond defines intention as "the foreknowledge of an act coupled with the desire of it". So he holds that an act is intentional, only if it extends to all the three elements namely origin, circumstances and consequences.

E.g.: If A takes B's watch believing it to be his own, there is no intentional wrong committed by him, as he has no intention as to the circumstance that the watch belonged to B.

3. Difference between 'Intention' and 'Motive':

Intention refers only to the immediate purpose with which an act is done. Motive is the ulterior purpose of the act.

E.g.: A commits theft of some biscuits to satisfy his hunger. Here the motive is for a good purpose namely satisfying his hunger but his immediate act of theft being with bad intention is punishable.

Thus if a man follows illegal means to achieve a good and legal purpose, even then he is punishable. Motive has emotions like love, fear, hatred, etc., whereas intention has no emotion.

G. NEGLIGENT ACT OR NEGLIGENCE:

Negligence is the breach of a legal duty by omission to do something which a reasonable man would do or by doing something which a reasonable man would not do. So negligence arises from **nonfeasance or misfeasance or malfeasance**. Negligence is simply neglect of care which law requires. The concept of care is a correlative term.

For e.g., a man carrying a sharp edged tool when he is in the crowd must be more careful than the person carrying an umbrella.

1. Objective Theory (Pollock's theory of negligence):

According to this theory, negligence is said to have nothing with the state of mind but it is an objective fact and it is a type of conduct. It is a breach of duty to take care and precaution against the harmful acts by his own actions.

Some eminent jurists like **Clark and Lindsell** have concluded that negligence is not a state of mind at all. It is expressed - "negligence consists in the omission to take such care as under the circumstances it is the legal duty of a person to take".

2. Subjective Theory:

According to **Salmond**, negligence invariably results due to the failure to take necessary precautions that a reasonable person would take, but such failure may be due to accident or with intention. So, Salmond says that negligence is a subjective fact and is a particular state of mind of the doer of the act.

According to **Austin**, a negligent wrongdoer is a person who does not know that his act is wrongful but would have known that it is because of his mental indolence, the negligent act has been committed.

Austin also distinguishes between negligence, heedlessness, rashness and recklessness, but Salmond includes all these four types under one head namely - negligence.

a. Negligence:

Negligence is the state of mind of the person who omits an act and breaks a positive duty.

b. Rashness:

The person who is rash does an act and breaks a positive duty.

c. Heedlessness:

The party who is heedless does not think of the probable mischief.

d. Recklessness:

The person foresees the consequences, but does not care whether they result from his act or not.

Salmond is of the view that negligence is the mental attitude of undue indifference with respect to one's conduct and its consequences.

III. DEGREE OF CARE:

In **Roman law**, there were different degrees of care. There were **three degrees of care** and correspondingly **three degrees of negligence**.

a. When a contract was concluded for a person's benefit or mutual benefit of both parties, then the 'kind of care shown by a good head of a family or an imaginary prudent man of business' was needed ***(Culpa levis in abstracto)***.

b. When both the parties have a common interest, then the parties have to show ordinary diligence ***(Culpa levis in Concreto)***.

c. It is failure to show reasonable care at all and amounts to wrongful intention ***(Culpa lata)***.

According to English and Indian law, there is only one standard of care that of the reasonable and prudent man in the considered situation will exercise. For civil liability, normal degree of negligence is required to be proved.

However for criminal liability, a high degree of negligence is required to be proved for the crime to be established.

H. TYPES OF NEGLIGENCE:

There are **two** types of negligence namely **advertent negligence** and **inadvertent negligence**.

1. ADVERTENT NEGLIGENCE:

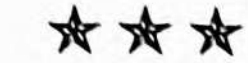
Advertent negligence is otherwise known as **wilful negligence or recklessness**. In this negligence, the harm done is foreseen as possible or probable consequence.

2. INADVERTENT NEGLIGENCE:

Inadvertent negligence is simple in nature. It is not willed or intentional. It is neither foreseen.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What is a juristic act? Every act is made up of three distinct factors or constituent parts. Explain.*
2. *What is meant by an 'act in Law'? Discuss the kinds of an act, its constituent parts and the two classes of acts considered in respect of their consequences.*
3. *What is Negligence? Distinguish between subjective and objective theories of negligence.*
4. *Explain negligence as a basis of liability. When is a person said to be negligent and by what test is his conduct judged to ascertain his liability for negligence?*
5. *What is negligence? Examine the correctness of the Statement that negligence is not a state of mind, but a type of conduct.*
6. *What do you understand by liability? Examine the different classifications of liabilities.*
7. *Write short notes on: (a) Degree of care (b) Advertent and inadvertent negligence (c) Juristic act (d) Negligent act (e) Theories of negligence*



36. LIABILITY AND ITS KINDS, THEORIES

(ACTUS REUS & MENS REA)(STRICT LIABILITY) (VICARIOUS LIABILITY)(MISTAKE OF FACT & MISTAKE OF LAW)(CAUSA PROXIMA)

SYNOPSIS:

A. *Definition of Liability*
B. *Classes/Kinds of Liability*
C. *Theory of Penal Liability*
D. *Theory of Strict Liability (Absolute Liability)*
E. *Theory of Vicarious Liability*
F. *Theory of Tortious Liability*
G. *Jus Necessitatis (Theory of Necessity)*
H. *Mistake of Fact and Mistake of Law*
I. *Causation or Causa Proxima*
J. *Difference between Tort and Crime*

A. DEFINITION OF LIABILITY:

Liability means the exposedness to the sanctions of the law. Any person disobeying the law will be visited with certain evil consequences and such evils are called **sanctions**.

B. CLASSES/KINDS OF LIABILITY:

Liability is of **two** classes:

1. CIVIL AND CRIMINAL LIABILITY: (REMEDIAL AND PENAL LIABILITY)

Civil liability is exposedness to civil proceedings and criminal liability is exposedness of criminal proceedings. The difference between Civil and Criminal proceedings are dealt in detail in ***Chapter No. 37, Page No. 347)***.

2. Remedial and Penal Liability:

If the State enforces a right which is due to the plaintiff, then it is remedial liability. If the purpose of the law is to punish the wrongdoer, then the liability is penal.

Criminal liability is always penal, as the purpose of criminal proceedings is always to punish the offender, but civil liability is not always remedial, as it is not always for compensation, but for other remedies also like specific relief, injunction, declaratory decree, abatement of nuisance, etc.

C. THEORY OF PENAL LIABILITY:

To constitute a crime, two elements are necessary, and they are:

1. Physical element or Actus Reus
2. Mental element or Mens Rea

The fundamental principle of penal liability is based on the Latin maxim ***"Actus non facit reum nisi mens sit rea"***. It means that an act does not become a crime, unless done with a guilty mind. So, the guilty mind and the act must concur to constitute a crime. Both the Actus reus and Mens rea are essential to constitute a crime.

I. Physical element or Actus Reus:

The term 'Actus' means a deed i.e., a physical result of conduct. It is defined as 'such result of human conduct as the law seeks to prevent'. For e.g., in the case of a murder, the conduct of the murderer is brought out by the victim's death. Here, the conduct is "Actus Reus".

The conduct of the offender is expressed in **three** ways:

a. A certain wilful movement or omission.
b. Certain surrounding circumstances including past acts.
c. Certain consequences.

Act is a conscious movement. It results from the operation of will. The will may be thinking and working out by mind. It may also be expressed by way of working out a problem on a paper. The former is called **Internal act** and the latter is called **External act**.

Elements of Act:

(a) Origin (b) Circumstances (c) Consequences

a. Origin:

If a person commits an act, he has to think of it and do some physical bodily activity. For e.g., If 'A' wants to shoot at 'B', 'A' must think of it and then raise his hand, apply his fingers on the trigger and pull it.

b. Circumstances:

Circumstances are the facts. The facts may be as follows for the above example:

1. The rifle must be already loaded.
2. B must be in the line of trigger point.

c. Consequences:

Consequences are the outcome (result) of the origin or circumstances. In the above example, the fall

of the trigger, the explosion of the bullet, the penetration of the bullet and B's death constitute the consequences of the act.

It is not the origin that completes the act as illegal, but it is only the circumstances and consequences which make the act illegal or an offence.

Four stages of commission of crime:

1. Intention (Mens rea)
2. Preparation (Actus reus)
3. Attempt (Actus reus)
4. Completion (Actus reus)

The first two stages are not commonly punishable, but only the last two stages constitute an offence and hence punishable. However, the second stage (preparation) itself becomes punishable in the case of preparation to wage war against Indian Government, preparation to commit dacoity etc.

Characteristics of act:

a. An act is an event subject to the control of will power. For e.g., 'A' falling from a tower or building is an event, whereas 'A' jumping from a tower or building is an act.

b. An act may include omission also. For e.g., a parent can be held liable for the murder of his child by slow starvation.

c. A man is liable only for such acts, the consequences of which are foreseen by him.

d. If there are subsisting and intervening causes, the act is not punishable. For e.g., if a man shoots a girl, but if she dies from fever, then the accused is not guilty of murder, because the death is not due to the act of shooting, but he will be held liable for causing hurt/grievous hurt.

e. Under certain circumstances, even without physical participation, a man's act is punishable. For e.g., a man in Delhi can be held liable for arranging the commission of a crime at Madras. Thus, acts like abetment and conspiracy are punishable even though there is no physical participation in the commission of the crimes.

f. The intervention of another person in one man's act may exempt the latter from liability. But the intervention by the other must be substantial.

II. Mental Element or Mens Rea:

The second essential ingredient in the crime is Mens Rea, i.e., guilty mind, an evil intention or knowledge of the wrongfulness of the act. There must be a mind at fault before there can be a crime. It is merely the **intention to commit an act** prohibited by law.

Glanville Willams defines Mens Rea as "the mental element necessary for a particular crime and this intention may be to do an act or a recklessness from doing a lawful act".

Motive:

Motive is the reason which induces a man to do an act. It is the ulterior objective of an act.

As a general rule, a man's motive is irrelevant in determining the penal liability of a person. A lawful act does not become unlawful, because it has been done with a bad motive. Similarly, an unlawful act does not become lawful because it was done with a good motive.

Characteristics of Mens Rea:

a. Mens Rea includes both **intention** to do a positive act and **recklessness** by abstaining from doing an act.

b. Intention is different from knowledge:

Intention is the desire to do an act. Knowledge means personal information of the person doing the act. Intention is punishable whereas knowledge is not always punishable.

For e.g., A doctor undertaking a difficult operation may have the knowledge of the death of the patient, but he has no intention to cause his death. Here, the doctor is not punishable.

c. Intention is different from motive:

Intention is the immediate result, whereas motive is the ulterior result of the act. For e.g., A commits theft of some biscuits to satisfy his hunger. Here the motive is for a good purpose of satisfying his hunger but his immediate act of theft being with bad intention is punishable. Thus, if a man follows illegal means to achieve a good and legal purpose, even then he is punishable. Motive has emotions like love, fear, hatred, etc., whereas intention has no emotion.

d. Intention is different from expectation:

Intention does not necessarily involve expectation. Expectation is the foresight of a desired issue. Intention does not foresee a desired issue.

Expectation does not in itself amount to intention, for e.g., a senior surgeon may know that his patient may die of a difficult operation but he does not intend his death though he expects.

e. Intention is different from malice:

Malice means ill-will, spite or malevolence. It is a wrongful intention and it also includes any intent which law deems as wrongful. It is also a wrongful act done intentionally without any justification.

Malice also means badness, wickedness, all forms of evil purposes, evil designs, evil motive etc.,

Doctrine of transferred malice:

In criminal law, a man is guilty if his unlawful act, if he intends a particular consequence, but takes affect upon an unintended object.

For e.g., If A shoots at B intending to kill him, but the shot actually kills C, who was standing near by. A will be held liable for murder of C also.

So in transferred malice, the intention is deemed to be transferred when an injury intended for one falls on another by accident.

D. THEORY OF STRICT LIABILITY: (ABSOLUTE LIABILITY)

Crimes of strict liability are those in which the necessity of Mens rea is wholly excluded. The person is held responsible for his act eventhough he has no intention to do the act and there is no negligence on his part.

The following are instances in the I.P.C. and other Acts, where as per strict liability, a person is punishable even though he has no intention nor negligent.

- Offence against the State like "waging war against the Government of India" (Sec.121)
- Sedition (Sec.124A)
- Assaulting high officers (Sec.152)
- Counterfeiting Indian Coin (Sec.232)
- Abduction (Sec.362)
- Kidnapping (Sec.359)
- Offences under the Food Adulteration Act, Essential Commodities Act, Foreign Exchange Act, Customs Act, etc.

E. EXCEPTIONS TO STRICT LIABILITY

1. Natural use of the land:

Playing cricket in the cricket ground is natural use of the land, and hence if anyone is injured due to the hit of the ball, he cannot recover damages.

2. THINGS NATURALLY ATTACHED TO THE LAND:

The Rule is ***Rylands Vs. Fletcher*** is applicable only to things, which a person keeps in his land. But, if damage is caused by anything which is naturally attached to the land, then the owner is not liable.

3. ACT OF GOD OR VIS MAJOR:

If by supernatural power like lightning, flood, etc., something escapes and causes damage, then the defendant is not liable.

4. WRONGFUL ACT OF A STRANGER:

If a third party wrongfully or intentionally causes any damage to the plaintiff, then the defendant was not liable.

5. PLAINTIFF'S OWN FAULT:

If the escape is due to the plaintiff's negligence or own fault, then the defendant is not liable.

6. COMMON BENEFIT:

If the escape is due to the consent of the plaintiff and it is for common benefit of both the plaintiff and the defendant, then the defendant is not liable.

7. STATUTORY AUTHORITY:

If the law has authorised the defendant to keep dangerous things, then the defendant is not liable for the loss due to the escape of things in the absence of negligence.

For e.g.: Municipal water tank, animals in approved circus, zoo etc.,

E. THEORY OF VICARIOUS LIABILITY:

Usually a man is held liable for his own acts only. But under the principle of vicarious liability, he is liable for the acts of others also.

Thus an individual who has not done the offensive act is held responsible for the result of an act done by the offender. For majority of offences under the I.P.C., the principle of vicarious liability does not apply.

However, in the following cases, the principle of Vicarious liability is applied:

The modern law recognises **two** types of vicarious liability.

1. Master and Servant

2. Dead persons and their representatives

1. MASTER AND SERVANT:

A master is liable for the wrong done by his servant in the course of his employment.

There are two principles involved in making the master liable for the acts of the servant.

i. "Qui facit per alium facit perse":

It means "He who does an act through another, does it himself". In such a case, the person authorising is liable for both the acts actually authorised and also for their direct consequences.

ii. Respondeat Superior: (Let the principal be liable):

It means - "let the superior be responsible". All acts done by the servant in the master's business are deemed to be the acts done by the master.

Since the master is rich and capable of bearing the civil liability and paying the compensation, he is made liable for all the activities of the poor servant who is financially weak to pay compensation to the injured party.

Vicarious liability in criminal offences:

Here, an individual who has not done the offensive act is held responsible for the result of an act done by the offender. For majority of offences under the I.P.C., the principle of vicarious liability does not apply.

However, in the following, the principle of vicarious liability is applied.

i. Sec. 154: (I.P.C)

The land owner is responsible for the offence of rioting, if it is committed on his land and if he does not report the matter to the Police Authorities.

ii. Sec. 155: (I.P.C)

Provides for cases where rioting is committed for the benefit of the land owner.

iii. Sec. 156: (I.P.C)

Agent or Managers are responsible for rioting in the absence of their Masters.

2. DEAD PERSONS AND THEIR REPRESENTATIVES:

Here for the acts of the dead persons, the living representatives are made liable on the principle of vicarious liability. In criminal offences and torts, the liability of the offender/tortfeasor gets terminated with his death and does not devolve on his legal heirs.

This is known by the latin maxim ***'Actio personalis moritur cum persona'*** meaning that a man cannot be punished in his graveyard/the right to sue a person dies with the death of the person.

However, the modern opinion is different that if the liability has origined while the offender was living, it should not be extinguished by the death of the offender.

If the representatives inherit the offender's properties, then they are made liable to pay compensation to the victims from the estate of the offender and in this context, it is a vicarious liability on the living representatives of the dead persons. For e.g., assault, defamation, etc.,

F. THEORY OF WRONGFUL /TORTIOUS LIABILITY:

There are **three** important principles:

1) Liability for wrongful act 2) Damnum Sine Injuria 3) Injuria Sine Damnum

1. LIABILITY FOR WRONGFUL ACT:

a. Meaning :

A wrongful act is one that is illegal, immoral, or unjust.

Wrongful act means any act, misstatement, or omission in violation of the law, especially the civil law. A wrongful act infringes the rights of another to his/her damage, unless it be done in the exercise of an equal or superior right. Wrongful acts includes illegal acts, acts that are immoral, anti social, or libel to result in a civil suit, error, misstatement, or breach of duty that results in a lawsuit against the person.

b. Types of Wrongful Acts :

1) Acts which cause some harm, and it is only on this ground that they are considered wrong.

2) Acts which are considered as wrong due to their mischievous tendencies.

c. Damage and liability:

In the first class of the wrongful acts, no cause of action arises without some actual damage. Actual damage does not include every kind of damage. A damage though caused by an act of a man, is not always wrongful.

For eg., Damnum sine injuria (a damage without injury or wrongful act) does not make a person liable.

In the second class of acts, the proof of the damage is not necessary, and the act alone makes the wrong doer liable.

Generally the civil liability arises on the actual damage caused. But as crime is a wrong against the society in general, snot only the act but also the mischievous tendencies also are considered wrongful and they are punishable. Therefore, in criminal law, attempt and in some cases, preparation also subjects a person to criminal liability.

2. Damnum Sine Injuria:

It means - the loss or damages without the violation of a law. Here, loss or damage is caused without violating the legal right of a person. It is not an actionable wrong.

There are many acts, which though harmful are not wrongful and therefore give to rise to no right of action in favour of the injured party. The most terrible harm may be inflicted by a man on another without violation of law. Thus, if X has a mill and his neighbour sets up another mill and thereby the profits of X' mill fall, X cannot bring an action against the neighbour and yet X has suffered damage.

3. Injuria Sine Damnum:

It means the violation of law without loss or damage. Here the legal right of a person is violated though there is no loss or damage. So it is an actionable wrong. It is sufficient to show the violation of a legal right. The law will presume damage.

G. JUS NECESSITATIS: (THEORY OF NECESSITY)

It is otherwise called **Right of Necessity**. Under overwhelming pressure of necessity, an act which would normally be a wrong, is exempted from punishment. It is expressed by the legal maxim ***"Necessitates non habet legem"*** meaning ***"Necessity knows no law"***.

A person cannot be punished for his act done under circumstances of extreme necessity. Though the act is done intentionally, mens rea is not attributed to the doer of the act. So, law recognises it as the right of a man to do acts of necessity and he cannot be discouraged by threat of punishment.

Illustration:

A and B, the two drowning men in a sea, catch hold of a plank not big enough to support both of them, but support only one. Here if A pushes B into the sea for securing the plank to save himself. This is not a crime.

In cases of necessity, the extent of harm done to the other person must be reasonable and proportionate. Otherwise the harmful act will not be completely excluded from punishment, but the punishment will be reduced.

R. Vs. Dudley:

Two sailors had been cast away in a storm on the seas in an open boat. They had a boy in their company. The two sailors had been without food for 7 days and so, they killed the boy for their food. After they were rescued, they were charged with the murder of the boy.

But the death sentence was reduced to six month's imprisonment, because of necessity. However, punishment could not be totally waived, because the Court held that no man can have the right to eat another man's flesh for the sake of his existence and if a life has to exist by this barbaric method, then such living is not necessary in this world.

H. MISTAKE OF FACT AND MISTAKE OF LAW:

I. MISTAKE OF FACT (IGNORANCE OF FACT):

Section 76 of I.P.C. says, 'Nothing is an offence which is done by a person, who is or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it'.

Mistake of fact is a justifiable defence against criminal liability. Law excuses the crime committed out of Mistake of fact.

If a person, in good faith and believing himself to be justified in doing so, and due to Mistake of fact commits a wrong, it is not an offence. Here the offender should be bound by the law to do the act.

Examples:

a. If A arrests Z instead of Y, by mistake under the order of the Court in good faith, he is not liable for any offence.

b. A, a soldier fires on a mob by the order of his superior officer in conformity with the commands of law. A has committed no offence.

Thus Mistake of fact is excusable, under the latin maxim, ***"Ignorantia factum excusat"***

Essentials:

1. The act must be done by a person who is bound by law in doing that.
2. The act must be done by a person who believes himself to be bound by law in doing that.
3. The belief must be due to mistake of fact and not by reason of mistake of law.

R. Vs Tolson:

Tolson was married in 1880 and was deserted by her husband after one year. On information, she learnt that he was lost in a ship that sank. Believing that he was dead, she married again before 7 years of his desertion, but Mr. Tolson returned from America and she was prosecuted for bigamy. It was held that bonafide belief on reasonable grounds in the death of the husband at the time of the second marriage was a mistake of fact and a good defence to the charge of bigamy.

R. Vs Prince:

Prince was guilty of unlawfully taking an unmarried girl under 16 years of age, out of the possession and against the will of her father. He was prosecuted under Sec. 55 of the 'offences against the persons Act'. The accused bonafidely believed that that the girl was eighteen years of age and he was induced by the girl to believe that she was of such age.

The following persons are immune from criminal liability:

i. Judicial Officers - while acting judicially.

ii. Ministerial or Executive Officers - acting in good faith and legally within their jurisdiction.

iii. Any other person bound by law - by reason of mistake of fat in good faith believes himself to be justified by law.

E.g., A sees Z commit what appears to A to be murder. A, in good faith seizes Z, to bring him before the proper authorities. A has committed no offence, though it may turnout that Z was acting in self defence.

II. Mistake of Law (Ignorance of Law):

Mistake of law is known by the latin maxim ***"Ignorantia juris non excusat"*** meaning that ignorance of law is no excuse for breaking/violating it. The legal presumption is that everyone knows law and must know law. It is a irrebuttable presumption. It is a strict liability that everyone must know law and negligence on the part of the violator in not knowing law is not excusable.

For e.g., If 'A' after killing B says that he does not know that murder is an offence, then it is not a defence.

The reasons for this strict accountability are as follows:

1. Since law is definite and knowable through publications, books, literature, etc., it is the duty of everyman to know all the laws concerning the day- today personal and business activities.

2. Even if justifiable reasons are available for not knowing law, still for the larger benefits of the society and strengthening the administration of justice, the ignorance of law is not excused.

In a leading case, some fishermen went into sea for fishing for about a month. In their absence, a new English law was enacted which punished fishermen who went for a long time. Their plea that they could not know the law was rejected and they were punished.

3. Most of the laws are based on natural law and hence while violating a law, the person knows that he is violating the rule of right and to that extent, his act is dishonest and unjustified.

Any relaxation in the strict liability of knowing law will lead to misuse by unscrupulous elements. Further, it is difficult to enquire and distinguish negligent ignorance of law and intentional ignorance of law.

I. CAUSATION OR CAUSA PROXIMA:

For any loss, damage, injury or death, in law only the immediate cause is looked into and not the remote cause. This is called **theory of causation or causa proxima**. In the words of **Lord Bacon** - judges need not look at the cause of causes infinitely. It is suffice if they look at the immediate cause without looking to any further degree.

CAUSA CAUSANS:

It is the real cause for the loss or damage, it is the proximate cause of the injury. Causa causans is only considered for the purpose of determining whether the injury caused is direct or remote.

CAUSA SINE QUA NON:

Cause without which there is no consequence. It is the cause without which the event would not have happened. This is not considered for the purpose of determining whether the loss or injury is direct or remote.

For e.g., A pushes B and B falls on a stone negligently left by C. Here A's pushing B is the causa causans. The presence of the stone negligently left by C is the causa sine qua non. Here A is the accused and not C.

DIRECT CONSEQUENCE TEST:

To decide the causation, direct consequence test is applied. According to this test, a person is liable for all the direct consequences of his act whether a reasonable man would have foreseen them or not. This view is held in the leading case in ***Re Polemis.***

In Re Polemis:

In this case, a steamship called **Thrasyvolous** totally caught fire and was destroyed due to the negligence of the defendant's servants. The defendant's company servants, while loading benzene oil in the ship, negligently placed a plank amidst the tins.

Though a reasonable man cannot have foreseen such damage to ship due to this small act, the Court applied the direct consequence test and held the defendants liable.

In this case, the following rules were laid down to decide causation:

1. When the damage is **not the necessary result of the defendant's act**, the defendant's act is considered to be not direct cause.

2. When the damage is due to the **plaintiff's own act**, then the damage or loss is deemed to be not direct, but remote.

3. When the damage is due to the **wrongful act of third party**, then the damage is deemed to be not direct by the defendant's act. The maxim underlying it is ***'Novus actus interveniens'*** - Intervention of human activity between the defendant's act and its consequence.

4. When a **third person interferes effectively** so that the defendant cannot be made liable, the damage caused is deemed to be not direct but remote.

J. DIFFERENCE BETWEEN TORT AND CRIME:

TORT
1. Civil wrong.
2. Private person takes action.
3. Compensation is the remedy.

4. Civil Court hears the case.

5. No Legislation or Act for it. Only a common law or Judgement law or Case law governs the determination of compensation.

6. In case of death of a tort feasor, his legal representatives can be sued (except in defamation, assault, etc.)

7. Limitation is a bar to an action in Tort.

CRIME

1. Criminal offence.

2. State or Police takes action.

3. Punishment is by way of fine, imprisonment, etc.,

4. Criminal Court tries the case.

5. There is an Act called the Indian Penal Code (I.P.C), and other criminal legislations.

6. Death of an offender puts an end to prosecution.

7. Generally there is no bar of limitation to a prosecution for a crime except in certain cases as per Sec. 468 of Cr.P.C

UNIVERSITY QUESTIONS FOR REVIEW:

1. *State and explain the conditions of Penal Liability.*

2. *Examine the basis of criminal liability. Describe the stages, mental and physical which lead to the commission and punishment for crime.*

3. *What is the role of 'mens rea' in Criminal Liability?*

4. *What do you understand by liability? Examine the different classifications of liabilities.*

5. *Write short notes on: (a) Strict Liability (b) Vicarious liability (c) Actus reus (d) Mens rea (e) Jus Necessitatis (f) Mistake of law (g) Mistake of fact*

37. LAW AND JUSTICE

(KINDS, PURPOSES, ADVANTAGES OF JUSTICE)

(ADMINISTRATION OF JUSTICE)

SYNOPSIS:

A. Justice and Administration of Justice

B. Kinds of justice

1. Natural or Moral justice

2. Legal justice

C. Components of justice

D. Difference between Criminal justice and Civil justice

E. Advantages of legal justice

F. Disadvantages of legal justice

A. JUSTICE AND ADMINISTRATION OF JUSTICE:

1. Origin and Growth of administration of Justice:

The origin and growth of administration of Justice is identical with the origin and growth of man.

In modern civilized societies, it has evolved through stages.

a) First Stage :

In early stage, the society was primitive.

During this stage. only private revenge and self-help were the remedies available to the affected person against the wrongdoer.

The affected person could get his wrong redressed with the help of his friends or relatives.

b) Second Stage :

In the second stage of development of administration of justice, the general administration of society was by establishment of state which came into existence in its preliminary form.

The functions of state were only persuasive in nature. It did not have power to punish the wrongdoer.

c) Third Stage :

In the third Stage of development of society, wrongs were redressed by payment of compensation by the wrongdoer to the affected victim.

Thus up to the third stage, the administration of justice remained private in nature without the compulsive force of the State.

d) Fourth/Present Stage:

In the fourth/ present stage, separate judicial system has evolved. The administration of justice is now under the control and managed of judges who are independent and not subordinate to executive or parliament.

Without administration of justice, it is possible to keep the people in fear of punishment or compensation for violation of law and in the process, people are kept disciplined and made to obey the law.

Force in all orderly societies in the form of administration of justice has now become latent by declaring the rights and duties of its subjects.

Justice is precisely treating like cases alike and giving fair and equal treatment to all persons, irrespective of status, religion, caste, sex, race, place of origin, etc., In otherwords, in rendering justice, there should not be singling out persons for special treatment, unless there are special circumstances for doing so.

Justice is thus an ideal concept. It is like truth. Law helps judges to pursue justice. Justice is also the conscience of the whole of society. Justice includes individual liberty for achieving individual and social welfare. At the same time, justice confines such liberty within limits, consistent with the general welfare of mankind.

Salmond defines the administration of justice as 'the maintenance of right within a political community by means of the physical force of the State'. It includes all the aspects connected with the administration of justice, not merely with the filing of cases in a Court but pronouncement of judgments and their execution.

One of the essential functions of the State is the administration of justice. Law, being the instrument of justice, Courts of Justice are also Courts of law, because justice has to be rendered according to law.

2. Necessity of administration of justice :

In primitive days, man redressed his grievances by taking revenge on his enemies by his own hand.

To quote Hobbes, "Kill whom you can and take what you can was the slogan of those days".

In order to live a decent and orderly life in society, the State should have powers of force against wrong doers and law violators.

The administration of justice is the modern and civilised substitute for the primitive practices of private vengeance and self-help.

Meaning:

Administration of justice means justice according to law. According to Salmond, it means maintenance of rights within a political community by means of the physical force of the State.

Physical force of the state is the sole or exclusive factor for a sound administration which also help obedience to law. These factors are social sanctions, habits, convenience etc.

Need for Administration of Justice

1. In determining a nation's rank in a political organisation, the test is how effective is its administrationof justice.

2. A State may not be called a state, if it has failed to discharge its functions concerning the administration of justice.

3. Life becomes risky in a society in which there is no preservation of the rights of men and no prevention of injustice.

4. There may not be any necessity of the administration of justice in a utopian form of society, but in the present materialistic world, it is impossible to live without the machinery of justice.

5. Administration of Justice, thus, must be regarded as a permanent and necessary element of civilisation and as a device that admits of no substitute.

3. Reasons for the need of administration of justice:

Administration of Justice is one of the most important functions of a Government, because of the following reasons:

1. Law exists to bind together the community;

2. It is sovereign and could not be be violated even at the inception of civilization;

3. Anti-social elements in society are required to be coerced by the police force and by imprisonment.

4. People of wicked nature needs teaching and discipline in order to be right. Hence for the maintenance of legal rights and for the prevention of wrongs and injustice, there must be efficient administration of justice according to pre-declared principles of law.

5. Sir Salmond observed, "Man being selfish, society can exist only under the shelter of the State and to achieve this, the law and justice of the state must be a permanent and necessary condition of peace, order and civilization.

B. KINDS OF JUSTICE:

Justice is of **two** kinds:

1. Natural or Moral Justice 2. Legal justice

1. NATURAL (OR) MORAL JUSTICE:

Natural justice is justice in deed and in truth. It is an absolute, perfect and ideal justice. The important principles of natural justice are codified in the form of legal rules.

The **four** important principles of natural justice are:

i. ***'Nemo debet esse judex in propria causa'*** – no man shall be a judge for his own cause.

ii. ***'Audi alteram partem'*** – hear the other side.

iii. ***'Doctrine of bias'*** – Partiality in decisions.

iv. ***Justice must not merely be done, but must be done manifestly and undoubtedly.***

Natural justice gives the ideals which the legal justice tries to achieve. The State formulates the natural justice in

the form of legal rules to make it obligatory for the subjects to follow.

Thus justice rendered by the Court according to these rules of natural justice is called legal justice.

2. Legal Justice: (Civil justice/civil wrong/civil liability And criminal justice/crime/penal liability)

Both civil wrongs and crimes are administered by legal justice. Based on the **civil wrong/civil liability** and **crime/penal liability**, legal justice is divided into **two** types:

i. Civil Justice ii. Criminal Justice

i. Civil Justice: (Civil Wrongs/Civil Suits)

Civil wrong is an infringement (violation) of the private or civil rights belonging to individuals and cause civil injuries.

For e.g., a breach of contract, or trespass to land infringe the rights of the individual wronged, but does not injure society in general. So, under civil justice the victim can sue for compensation in civil Courts.

The civil wrongs and civil suits are dealt under civil proceedings in Civil Courts. If a civil proceeding is successful, then it results in judgement and decree for enforcement of the rights of the plaintiff.

The object of civil proceedings is thus enforcement of rights. Both in civil and criminal proceedings, realization of money is involved (in civil - damages or compensation and in criminal - penalty, fine, etc.,) and for disobedience of civil decrees, civil imprisonment is imposed.

Civil disputes are mostly private in nature and they are not committed against the community at large and the goal of civil procedure is non punitive.

ii. Criminal Justice: (Criminal Wrongs)

Crimes are breach and violation of public rights and dutiess. They affect the whole community. Law considers crimes as harmful for the society in general, even if the victim is only an individual.

For e.g., murder is an offence against individual, but it is considered as a harm to the society and so mere compensation to the victim's family from the murderer is not sufficient punishment to the murderer. The State further proceed against the accused and on proof, convict him with imprisonment/fine, etc.,

Crimes and offences come under the purview of criminal proceedings. Criminal proceedings are conducted in criminal Courts.

The criminal proceedings result in punishments like death sentence, life imprisonment, rigorous imprisonment, simple imprisonment and fine. It also includes executing bonds for keeping piece and tranquility and also keeping good behaviour.

The object of criminal proceedings is to punish wrongs and crimes of more harmful to society and people than civil disputes. Sometimes, the civil wrongs and criminal crimes overlap each other. The following are the instances:

1. Certain wrongs are committed against the State and therefore they are called public wrongs, but law regards them as civil wrongs. For e.g., refusal to pay taxes is an offence against the State, but it is a civil wrong only. Similalry, an action by the State for the recovery of a debt is purely civil, though it may be a public wrong.

2. Some civil wrongs cause more harm than criminal offences. For e.g., the gross negligence of a contractor in construction of a building may result in collapse of the building, thereby causing great loss to property and life. This is more harmful than a petty theft or assault or criminal trespass.

3. Sometimes, the same acts simultaneously amount to both a crime and a civil wrong. For e.g., defamation, insult, negligence, etc.,

PURPOSE OF CRIMINAL JUSTICE:

Purpose of the Criminal Justice System:

1. The purpose of the Criminal Justice System is to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent.

2. It is to deliver an efficient, effective, accountable and fair justice process for the public.

3. One of the main purposes of the Criminal Justice System is that the prisons should reduce crime in three principal ways:

   - by incapacitating offenders,

   - by punishing and thereby deterring others who would commit crimes, and

   - by rehabilitating offenders.

4. Its main challenge is that of making the prisons system and the processes associated with dealing with prisoners more effective and efficient.

5. Its main a is protecting the innocent and punishing the guilty. Its another aim is crime control. It's main challenge is one of effectiveness.

6. What is 'fundamental to the welfare and happiness' of citizens, is strong public institutions and its proper management. This is another purpose of the Criminal Justice System:

7. The ultimate result of effective Criminal Justice System is that poor and weak citizens must get justice against the rich and powerful wrong doers.

8. Justice is a delicate plant. It has to be nurtured, protected, cared for.

9. The justice system should have concern for due process, checks and balances, core values and an underlying institutional strength to have effective and efficient control of crime.

10. Under the US crime control model, the underlying logic of the criminal justice is to contain and repress criminal behaviour. Successful criminal dete- ction, prosecution and conviction are hallmarks of an effective criminal justice model.

11. The protection of individual liberty in the face of a potentially over-powerful state is a key preoccupation of the due process model.

12. A jurist remarks,- Criminal justice administration is a complex social institution which regulates potential, alleged and actual criminal activity within procedural limits supposed to protect people from wrongful treatment and wrongful conviction'.

13. A concern with the appropriate principles and priorities that guide the operations of the criminaljustice process remains an important and necessary task.

C. COMPONENTS OF JUSTICE:

The components of justice are of two types-

i) Criminal justice system

ii) Civil justice system

I. Criminal Justice System :

There are three basic components of criminal justice system:

a) Law enforcement,
b) Courts(judiciary)and
c) Corrections.

a. Law Enforcement:

Law enforcement officers(police and other investigating agencies)investigate crimes, gather and protect evidence, and take reports on various crimes. Officers may arrest offenders, give testimony in court, and continue investigating after making an arrest. Thus law enforcement officers play important role in the components of criminal justice system.

b. Courts:

Courts are presided by judges. Their role is to ensure that rule of law is followed in every case. The judges hear evidence presented by advocates of both the sides ie., who argue for prosecution and for the accused.

Judges accept or reject the pleas in agreements, oversee trials, and sentence offenders who are convicted of a crime. A fair and honest court system considers all evidence in a rational manner, and then renders an unbiased judgment.

c. Correction system:(prisons)

After offenders are convicted in the courts, the correction system namely the prison separates them from the rest of society. The present reformative penal system has trained professionals who help rehabilitate the convicts.

The correction system monitors the convict after release so that he does not commit a crime again. Correction officers supervise convicted offenders who are released on probation of good conduct and behavior and convicted offenders on parole.

They ensure that the correctional facilities are safe and secure.

II. Components of civil justice:

There are three basic components of civil justice system:

a) Compensation

b) Specific enforcement

c) Courts (judiciary)

a. Compensation:

Since the plaintiff suffers some loss on account of the defendant's wrong, the defendant is compelled to make amends for the same. For eg., compensation for destruction of a property belonging to the plaintiff.

Penalty:

Though the plaintiff has not suffered any loss, the defendant has to pay some pecuniary penalty to the plaintiff because of the defendant's wrongful acts.

b. Specific Enforcement(Performance):

Enforcement of primary right is called **specific enforcement** - for e.g., an injunction to restrain trespass.

Specific Relief/Enforcement/Performance means a decree issued by the Court that the defendant should actually perform his promise. There is no money compensation for the breach of the contract but actual performance of the contract. This is based on equity and justice. The right to specific relief is discretionary and not absolute.

c. Courts:

Courts are instruments of rendering justice, such Courts can act against the State, by adjudicating the claims of the citizens against the State. An aggrieved citizen may sue the Union Government and State Governments and private persons in the Courts.

D. DIFFERENCE BETWEEN CRIMINAL JUSTICE AND CIVIL JUSTICE:

The main differences are as follows -

I. CRIMINAL JUSTICE:

a. All Criminal Wrongs are administered by Criminal Justice.For eg., Theft, murder, rape, forgery, etc.

b. All crimes are public wrongs.

c. Most of the Criminal proceedings are instituted by the State(Government) .

d. A crime is treated as a harmful act to the entire society.

e. The object of the criminal justice is to **'punish'** the wrong-doer, ranging from death to fine.

f. Criminal Justice is administered according to the law of Criminal Procedure (Cr.P.C).

g. The doctrine of estoppel(No can deny what he has said or done) does not apply to criminal justice.

h. The principle of criminal justice is that thousand guilty men can escape, but one innocent should not be punished"

i. The guilt must be proved beyond reasonable doubts.

j. The benefit of doubt always goes in favour of the accused.

k. The rules of evidence cannot re relaxed by consent of the parties.

l. The cases once instituted cannot be compounded or withdrawn in the criminal justice excepted permitted by law.

m. The burden of proof always lies on the prosecution.

n. In criminal cases, the obligation lies on the Court to bring all relevant evidence on record so that justice is done to the accesed.

o. The criminal justice deals with remedial and breaches of duties. So it is a corrective justice.

p. Criminal courts administer the Criminal Justice.

II. CIVIL JUSTICE:

a. All civil wrongs are administered by Civil Justice. For eg., Breach of contract, trespass to land etc.

b. All civil wrongs are private wrongs.

c. Generally, the affected person institutes the civil proceedings

d. Civil wrongs are deemed only to violate the rights of individual/s.

e. The object of the civil justice is to provide 'compensation' to the affected person by the twrong-doer.

f. Civil justice is administered according to the law of Civil Procedure(C.P.C).

g. The doctrine of estoppel applies only civil justice.

h. The principle that thousand guilty men can escape rather than one innocent should be punished does not apply to civil proceedings.

i. The rules of evidence may be relaxed by the consent of parties.

j. The proceedings may be withdrawn by the parties with their own consent.

k. The burden of proof lies on both the plaintiff and the defendant.

l. In civil proceedings, it is the duty of the parties to the dispute to prove their case.

m. **'Benefit of doubt'** principle does not arise in civil justice.

n. The civil justice deals with the distribution of property,wealth and honour. So it is a distributive justice.

o. Civil courts administer the civil justice.

E. ADVANTAGES OF LEGAL JUSTICE:

There are **three** main advantages of administration of justice according to fixed principles of law.

1. Uniformity and certainty in the administration of justice is ensured by a legal system. If law is not certain and known to the people, then its guidance would be useless.

   The Judges enforce law uniformly as they have knowledge of law. The people act accordingly so as to abide by the law.

2. Law assures impartiality in the administration of justice. Judges may sometimes be influenced by improper motives but the public will easily observe and redress such a mischief. By following fixed legal rules, impartiality is secured.

3. The rules of law are the outcome of the collective wisdom of the community and its knowledge of - what is needed to the society.

   The Judges have to be reasonable and arrive at fair conclusions, by using their experience and wisdom. **Lord Coke** says, 'the wisdom of the law is wiser than any man's wisdom'.

4. If Law has fixed rules, then it acts as a protection against arbitrary and biased decisions. Administration of justice according to law is therefore regarded as one of the first principles of political liberty.

   Thus law provides uniformity, certainty and impartiality, but still there are some disadvantages.

F. DISADVANTAGES OF LEGAL JUSTICE:

1. **Rigidity** is the common defect of a legal system. The rigid rules may be hard and result in injustice to some individual cases. Fixed legal principles impart rigidity to the legal system.

2. **Conservation** is the second defect of the legal system. As the society is changing, the outlook of men and their view of truth and justice also change. The law also has to change according to the society's views, whereas it is inherently a stationary and conservative force.

3. Sometimes, law gives undue importance to the wording of a statute rather than to the spirit of it. If the wording is defective or ambiguous, justice is hindered.

4. As the law reflects the complex activities of civilized life, it has assumed uncontrolled dimensions. Though the complexity is reduced by codification, it cannot solve it completely due to the interpretations and subtle distinctions arising from the provisions of law.

5. As the rule of law is fixed and written, ingenuine men devise ways and means to evade and defeat it without affecting the provisions of law.

Thus there are advantages and disadvantages in a legal system to administer justice. But Salmond concludes that 'the law is without doubt a remedy for greater evils, yet it brings with it evils of its own'.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Distinguish between law and justice. What are the advantages and disadvantages of administration of justice according to law?*

2. *Explain how law and justice are correlative.*

3. *Explain the necessity for administration of justice, pointing out the advantages and disadvantages of having law as its basis.*

4. *'Administration of justice in a wider sense includes all the functions of Court of justice' – Discuss. Distinguish between civil and criminal administration of justice.*

5. *Distinguish between remedial and penal liability.*

6. *Explain the Components of justice.*

7. *Write short notes on: (a) Administration of justice (b) Civil justice (c) Criminal justice (d) Components of justice.*

38. JUSTICE DELIVERY SYSTEM IN INDIA

SYNOPSIS:

A. Introduction

B. Modes of Justice

C. Administration of Justice

D. Judicial Process

E. Constituents of Justice Delivery System

F. General Functions of Courts

F-I. Functions of District Courts and Subordinate courts

F-II. Functions of High Courts

F-III. Functions of Supreme Court

G. Factors responsible for delay in Judicial Proceedings

H. Role of investigative agencies (Police)

I. Factors responsible for lapses in investigation by Police/investigative agencies

J. Role of the prosecutor

K. Plea bargaining

L. Amendment to the Code of Civil Procedure Code in 2002

A. INTRODUCTION :

The Preamble of the Constitution guarantees the people of India "JUSTICE -Social, Economic and Political."

B. MODES OF JUSTICE :

Justice has basically **two** modes:

1. **Criminal Justice,** which includes investigating agencies such as police, prosecution, accused and courts.

2. **Civil Justice ,** which includes plaintiff, respondent, government machinery and courts.

C. ADMINISTRATION OF JUSTICE:

Administration of justice is the most essential function of State.

The State enacts laws and compels people to obey them and in case of disobedience, through the Judicial wing namely courts punish such acts of disobedience by imposing penalties, fines , imprisonments etc.,

D. JUDICIAL PROCESS:

Judicial Process involves the following-

1. Right claimed or wrong complained by one party against other.

2. Hearing of parties by the Court.

3. Judgment of the court delivered at the end of trial.

4. Execution proceedings of the operative part of the judgment.

E. CONSTITUENTS OF JUSTICE DELIVERY SYSTEM:

I. PERSONS CONSTITUTE JUSTICE DELIVERY SYSTEM:

1. Aggrieved(affected Persons (Plaintiffs/petitioners in Civil Cases and Complainants in Criminal Cases)

2. Alleged wrongdoers(Defendants/respondents in Civil Cases and Accused in Criminal Cases)

3. Police (CBI,CBCID, etc.,)

4. Prosecutors (Assistant public prosecutors, Public prosecutors)

5. Advocates representing plaintiffs and accused

6. Courts (from lower courts to Supreme Court). It is the Courts which deliver Justice.

II. HIERARCHY OF COURTS IN INDIA:

a. Supreme Court

b. High Courts

c. District Court & Subordinate Courts.

F. GENERAL FUNCTIONS OF COURTS:

1. Administration of justice in accordance with law

2. Adjudication of civil and criminal cases

3. Decides on Constitutional questions

4. Administrative functions

5. Advisory functions

6. Protection of fundamental rights by way of Writ Jurisdiction

7. Guardian of Constitution

F-I. Functions of District Courts and Subordinate courts:

1. Proceedings of civil cases in accordance with the Code of Civil Procedure.

2. Proceedings in criminal cases in accordance with the Criminal Procedure Code.

F-II. Functions of High Courts:

1. Original Jurisdiction

2. Appellate Jurisdiction

3. Writ Jurisdiction

4. Court of Record

F-III. Functions of Supreme Court:

Original Jurisdiction-

a. Dispute between States, or, between State/ States and Centre

b. Writ Jurisdiction for protection of Fundamental Rights of Citizens

c. Appellate Jurisdiction

d. Advisory Jurisdiction

e. Revisory Jurisdiction

f. Court of Record

G. FACTORS RESPONSIBLE FOR DELAY IN JUDICIAL PROCEEDINGS:

1. Disproportionate Judges to litigants/accused ratio.

2. Frequent adjournments by advocates even for filmsy reasons

3. Under resourced and over burdened court systems.

4. Poor infrastructures in Courts.

5. Delay on the part of Investigative agencies.

H. ROLE OF INVESTIGATIVE AGENCIES (POLICE):

1. Examination of witnesses

2. Collection of evidence

3. Arresting accused, if prima facie involvement in crime is established.

4. Filing of charge sheet.

5. Coordinating the prosecutor in conducting trial.

6. Witnesses/Victims protection

I. FACTORS RESPONSIBLE FOR LAPSES IN INVESTIGATION BY POLICE/ INVESTIGATIVE AGENCIES:

1. Failure to submit charge sheet in time.

2. Police burdened with lots of duties and responsibilities.

3. Police unable to prevent intimidation/bribery of witnesses.

4. Delayed laboratory/Forensic reports.

5. Excessive workload

6. Non cooperative attitude of public at large

7. Inadequacy of logistical and forensic backup support

8. Interrupting investigation by police personnel being withdrawn for Law & Order work during investigation.

9. Lack of coordination between police and prosecutors.

10. Any crime committed is not merely against the victim, but against the social order.

11. Prosecutors' appointments not on merit but on political considerations.

J. ROLE OF THE PROSECUTOR:

1. Not to merely seek conviction, but to ensure justice

2. To present all evidence before the courts.

3. To maintain honesty and integrity and keep his hands clean.

4. To ensure that adequate number of witnesses are called at each hearing and none go unexamined.

5. To ensure that documents are put up to the Court in time

6. To ensure that police officers appear in courts as per the schedule fixed by the court

K. PLEA BARGAINING:

Plea bargaining was introduced vide Chapter XXI A in CrPC.

Plea bargaining is the "process whereby accused and prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval."

Many criminal cases end by the process of plea bargaining.

L. AMENDMENT TO THE CODE OF CIVIL PROCEDURE CODE IN 2002:

The following changes were introduced by the CPC Amendment 2002.

1. The objective is to provide Speedy Justice.

2. Institution of Suits is now by way of plaint, accompanied by an Affidavit.

3. The time limit to serve the summons is 30 days from the date of filing the suit.

4. Alternate Dispute Resolution:

It means different methods of resolving disputes outside the traditional legal and administrative forums. It is guided by the Arbitration & Conciliation Act,1996

Courts were given power of referring the disputes to four basic methods.

1. Arbitration

2. Conciliation

3. Lok Adalats

4. Mediation

All the above four methods have been given statutory recognition by sec 89 of the Code of civil procedure amendment act,1999.

Need for Alternate Dispute Resolution:

1. Huge pendency of cases in regular courts.
2. To ensure the faith of common man in the justice delivery system.
3. Article 21 If the Indian Constitution states that right to speedy and fair trial is a fundamental right.
4. Inexpensive justice.
5. Prevents reliance on informal means of justice delivery.
6. No formal rules of evidence.
7. Dissatisfied parties may approach civil court
8. Process of finding amicable solution between parties.
9. final and binding on both.
10. Simplest and most powerful method of settling commercial disputes.

Advantages of Alternate Dispute Redressal :

1. Lesser time.

2. Cheaper

3. Less formal procedures than courts.

4. Held at more suitable venues.

Disadvantages of Alternate Dispute Redressal :

1. Not suitable for all disputes.

2. May still end up in courts.

3. Voluntary participationis required.

4. Problems encountered in implementation.

5. Lack If Infrastructure facilities.

6. Lack of proper institutional framework.

7. Lack of finances and their proper allocation.

8. Lack of trained Human Resources.

National Legal Services Authority (NALSA) Act, 1987:

1. Provides free legal services to the weaker sections of the society.

2. Organizes Lok Adalats for amicable settlement of disputes.

3. It offers the following 'Free Legal Services'-

a) Payment of court, processing fee & other charges.

b) Providing advocate in legal proceedings.

c) Providing certified copies of orders & otherdocuments in legal proceedings.

d) Preparation of appeal including printing &translation.

e) Prelitigation settlement by mediation/conciliation

The following persons are eligibile to get free legal aid-

1. Women & children.
2. Members of SC/ST.
3. Industrial Workmen
4. Victims of trafficking in human beings or beggars.
5. Victims of mass disaster.
6. Disabled persons.
7. Persons in custody.
8. Persons whose annual income does not exceed Rs. 1,00,000/-

OtherJudicial Reforms/Initiatives:

1. Fast track courts- Fast track courts were established to render quick justice.

2. National e-Court Project.

3. Court Cases Monitoring System.

4. CCTNS.

5. Increasing access by reducing delay

6. Enhancing accountability through structural changes & setting benchmarks for disposal of cases.

7. Identify & remove bottlenecks.

8. Categorization & clubbing of cases.

9. Greater requirement of financial resources.

10. Staffing & recruitment.

11. Bridging the demand & supply.

12. Training & performance management.

13. Database.

14. Modernization.

15. E-courts.

Government and Higher Judiciary have taken the above initiatives to ensure "Fast and Free Justice to all".

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain Constituents of Justice Delivery System in India.*

2. *What are steps and initiatives taken by government and higher judiciary to tone up the justice delivery system in India?*

3. *Write short note on- a)J ustice Delivery System in India. b) Criminal Justice Delivery System in India c) Civil Justice Delivery System in India d) Alternate Dispute Resolution.*

39. THEORIES, PURPOSES AND MEASURE OF PUNISHMENT
(CRIMINAL JUSTICE)

(MOST IMPORTANT)

SYNOPSIS:

A. Theories of Punishment (Criminal Justice)

1. Retributive Theory

2. Preventive Theory

3. Deterrent Theory

4. Reformative or Rehabilitative Theory

B. Analysis of the two theories (Deterrent and Reformative)

C. Purposes of punishment

D. Measure of punishment

A. THEORIES OF PUNISHMENT: (CRIMINAL JUSTICE)

There are different theories put forward regarding the aim, purpose and object of punishing an offender.

The following are the **four** important theories.

1. RETRIBUTIVE THEORY:

This theory involves **four** concepts:

i. Punishment is the end result of punishment.

ii. Punishment is inflicted on a person for the only reason that he has committed a crime.

iii. There must be restoration of moral order in the society which is possible only by punishing the offender in the same manner as of the victim.

iv. Punishment by revenge utilises the evil effect of crime.

Everyone should get punishment according to his deeds and must suffer for his wrong doing, though by such punishment of the person, the society is not benefited in any way.

The supporters of this theory are **Immanuel Kant, Plato, Hegel and others.**

In ancient days, the penology was of **retributive nature.** The criminals were got rid of for the good of the community. Their attitude was that of vengeance of 'a tooth for a tooth' and 'an eye for an eye'.

Salmond says that retribution is not a remedy for the crime done by the offender. On the other hand, it only aggravates the offence, by committing the same act on the offender by way of revenge.

Here the punishment inflicted on the offender by revenge adds pain and suffering to the misery already occasioned by the offence of the criminal. As the aim of this theory is not justified, it is criticised by many jurists.

Sir James Stephen says that punishment of the offender by committing the same act on him is only a revenge after approval by law and society. This method

is only to avoid private vengeance by illegal means by the affected party or their relatives.

According to **Kant**, an offender committing the evil must suffer in the same way.

Criticism:

Mr. Justice Holmes says that the spirit of vengeance should not be encouraged. Retribution is only a subsidiary purpose served by punishment and it is not the only purpose.

2. Preventive Theory:

The object of criminal justice is to prevent the commission of crimes. So according to this theory, law inflicts certain pains on citizens, if they do certain harmful acts.

Thus the aim of law is that the citizens should not commit such wrongs. If they continue to do so, then it inflicts the pains so that such threats will make others not to commit such wrongs.

According to this theory, the purpose of punishing a criminal is to deprive him temporarily or permanently of the power to repeat the offence.

During the period of detention, a prisoner is prevented from committing further crimes and if the crime is of a very serious nature, he is permanently prevented from repeating it by putting him to death.

Thus, this theory is of the view that the culprit is eliminated by death or detained by imprisonment. So that further commission of crimes by him is prevented.

This theory is criticised by many jurists that it does not look into the criminal, but only on the crime. It only prevents the criminal from committing any more crimes, but it has no object of reforming the criminal.

3. Deterrent Theory of punishment :

The object of this theory is to inflict deterrent (severe) punishment on the offender and thus make him an example to warn others as to commit similar offences and if they do so they will also have to face the same consequences.

Thus this theory advocates that the hardened a criminal must be severely punished. The punishment should be so drastic that it will act as a terror in the minds of the people and hence they will not attempt doing such offences.

If deterrent punishment is the way to curb crimes, then it is really very cruel. It forgets that the fear created by even the most terrible punishments will be blunted by long familiarity with that type of punishment. There are instances where people were unwilling to co-operate with the State in carrying out deterrent punishment to the offender.

This theory has been criticised as people in the long run will become immune even to severe punishments. Further like other theories it looks only into the punishment aspect and not at the criminal.

4. Expiration Theory:

Expiration means "compensation" or suffering or punishment for an offence. The offender, according to this theory, pays compensation to the victim for the offence committed by him and to make good the loss suffered by the victim. The criminal is punished economically as per the expiration theory of punishment.

5. Reformative or Rehabilitative Theory:

According to this theory, death is not a fitting punishment to a criminal. Society must cure a criminal and not kill him. Criminals must be sent to prison only to get transformed as good citizens by physical and moral trainees and not for further degradation.

The purpose of punishment is to reform the character of the wrong doer by making him do what is right and not to do what is wrong. The legitimate object of punishment is to **reform, educate and discipline** the criminal.

Crime is treated as a disease which needs to be cured and not to be punished. Criminal justice should be a means of social and ethical education. The judge is like a doctor who selects his remedy after diagnosing the disease of the patient.

The reformation of a criminal, though important, should not be magnified, because crimes would increase exceedingly unless it is repressed by law. So, crime cannot be always treated as a disease. Further in practice, it has no effect on hardened criminals.

B. ANALYSIS OF THE TWO THEORIES: (DETERRENT AND REFORMATIVE)

1. According to the **Deterrent theory**, death penalty is an admissible mode of punishment but according to the **Reformative theory**, capital punishment is completely inapplicable as the person cannot be reformed by hanging him to death.

2. According to the **Deterrent theory**, only corporeal punishment has potential effect on criminals, but as per **reformative theory** causing pain on criminals does not cure him nor prevent him from repeating the offences, but it believes by such severe punishments, it will have only opposite effects on them and after such punishments, they cannot be reformed at all.

3. For hardened and habitual criminals, the **deterrent theory** requires ruthless application of severe penal discipline. The **reformative theory** abandons such cases, because curative treatment has no effect on them.

4. The **deterrent theory** lays down that punishment should be deterrent by the character of the crime, but the reformative theory considers only the criminal and not the crime.

5. According to the **deterrent theory,** in the 18th century psychological grounds of criminality were not considered. E.g. Insanity, sudden provocation, etc.

But now, under the influence of the **reformative theory**, mental disease or natural mental infirmity are considered and such persons are treated leniently and sympathetically.

For a perfect system of criminal justice, neither the reformative nor the deterrent theory can be exclusively relied upon. So, a via media between the two is sought to be achieved.

Thus the deterrent and reformative theories should be reconciled in actual practice. The punishment should deter a sane man from committing crimes and at the same time reform him.

C. PURPOSES OF PUNISHMENT:

The primary purpose of punishment is to prevent crime and it is obtained in **three** ways:

1. Punishment acts on the body of the offender to incapacitate him from repeating the crime.

2. By punishment of the criminals, the others are deterred by fear from breaching the penal law.

3. Punishment minimises crime by reforming the character of the criminal and thus the object of punishment is to prevent crime.

The subsidiary purpose of punishment is the elevation of the moral feelings of the community achieved through criminal justice of the State.

D. MEASURE OF PUNISHMENT:

The maximum penalties for various offences are prescribed by the Criminal Law and the Courts award sentences. The Court of Law consider **three** factors for awarding punishment to a criminal.

1. MAGNITUDE OF THE OFFENCE:

The punishment depends upon the intensity or gravity of the offence. The gravity is more if the tendency of the offence is to injure the community. The law provides the maximum punishment for an offence and the Judges have the discretion to inflict any punishment upto the maxim limit.

The maximum punishment may be inflicted only for extreme cases. If the Court fails to consider the gravity of the offence, then only injustice will result.

2. INTENTION OF THE OFFENCE:

For every crime, the essential mental element namely intention is important. For severe intention, the severity of the punishment increases. The greater the temptation of man to commit an offence, the severer should be the punishment to threaten him.

Absence of intention or Mens rea is considered for reducing the punishment. For eg., insanity, sudden and grave provocation, etc.

3. CHARACTER OF THE OFFENDER:

The character of the offender should be considered for regulating punishment. For an offender of worse character, severe punishment should be given.

Habitual offenders should be punished severely but they should not be sentenced to severe punishment for a trivial offence merely because they are habitual offenders.

Law is specially careful in dealing with offenders whose characters have yet to be formed, eg., juvenile offenders. Thus offenders under fifteen years of age are treated specially and are sent to reformatory schools, to make them useful members of society.

Further the good character of an offender is always consider by the Court for awarding lenient punishments.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss the purpose and scope of the following in the administration of criminal Justice:*
   - i. *Imposition of fine*
   - ii. *Sentence of probation*
2. *Examine the relative merits of various theories of law on punishment.*
3. *a. What is the object of punishing a law breaker?*
   b. Do you consider that the imposition of Capital punishment is necessary?

40. FUNCTIONS OF CIVIL COURT

(PRIMARY AND SECONDARY FUNCTIONS OF COURT)

SYNOPSIS:

A. Introduction

B. Primary functions of Court

1. *Specific Enforcement*
2. *Sanctional Enforcement*
   a. Compensation
   b. Penalty

C. Secondary functions of Court

D. Legal Aid

A. INTRODUCTION:

Civil justice aims at enforcement of rights. The civil rights are enforced through Civil Court. The functions of Civil Court are of important study, as they aim at rendering Civil Justice.

The functions of Courts are divided into **two**:

1. Primary Functions 2. Secondary functions

B. PRIMARY FUNCTIONS OF COURT:

1. SPECIFIC ENFORCEMENT(PERFOMANCE):

Enforcement of primary right is called **specific enforcement** - for e.g., an injunction to restrain trespass. Enforcement of sanctioning right is called **sanctional enforcement** - for e.g., a decree for damages for the tort of defamation.

Only when specific enforcement is not possible, sanctioning enforcement is resorted too.

2. SANCTIONAL ENFORCEMENT:

It is of **two** types:

a. Compensation

b. Penalty

a. Compensation:

Since the plaintiff suffers some loss on account of the defendant's wrong, the defendant is compelled to make amends for the same. For eg., compensation for destruction of a property belonging to the plaintiff.

b. Penalty:

Though the plaintiff has not suffered any loss, the defendant has to pay some pecuniary penalty to the plaintiff because of the defendant's wrongful acts - For e.g., in the case of ***Ashby Vs. White***, though the candidate for whom the plaintiff wanted to poll his vote has won, the defendant was held liable to pay a penalty for his wrongful act of refusing the plaintiff to poll his vote. This is called **injuria sine damnum**.

C. SECONDARY FUNCTIONS OF COURT:

The term administration of justice, in a broad sense, includes all the functions of Court. By virtue of the constitution, procedure, authority and special knowledge of the Court, in the present days, they are vested with more similar functions.

Thus though the Courts are primarily engaged in rendering justice, they also perform other functions and these functions are referred as **Secondary functions of the Court.**

i. Though Courts are instruments of rendering justice, they are the outcome of the State force only. Even then, such Courts can act against the State, by adjudicating the claims of the citizens against the State.

Thus in India, an aggrieved citizen may sue the Union Government and State Governments in the Courts.

Any action against government is tried by the Court as if it were a dispute between subjects.

ii. In addition to rendering justice, the Court also declares that a certain person possesses certain rights. Such decrees are called **Declaratory Decrees.** It is an authoritative declaration that the particular right to a person/s exist.

For e.g., Declaration of nullity of marriage, legitimacy of marriage, declarations of the legality or illegality of the acts of State Officers, authoritative interpretation of wills and Statutes, etc.

iii. The Courts also act as **managing bodies** - for e.g., they make collections, distribute estates and carry on insolvency or liquidation proceedings, administrate trusts, engage in liquidation of a company and the realise and distribute the estates of insolvent persons, etc.,

iv. Courts also **create, transfer or extinguish rights** - for e.g., order of appointment of guardian for properties of minor, a decree of divorce or judicial separation, an adjudication of bankruptcy, appointing or removing trustees, grant of letters of administration, etc.

All these secondary functions of the Court are part of civil administration of justice and they are not in any way criminal administration of justice.

D. LEGAL AID:

1. Legal Aid implies giving free legal service to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a legal proceeding in any court, tribunal or before an authority.

2. In simple terms, Legal aid is the provision of **assistance to people who are unable to afford legal representation and access to the court system.**

3. Legal aid is regarded as central in providing access to justice by ensuring **equality before the law,** the **right to counsel** and the **right to a fair trial.** Legal aid is essential to guaranteeing equal access to justice for all.

4. For citizens who do not have sufficient financial means, it helps by assistance by legal professionals for free (or at a lower cost) or of receiving financial aid to conduct legal cases.

5. In India, the **Article 39A of the Indian Constitution** provides for equal justice and free legal aid – The

State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

This Article emphasises that free legal service is an essential element of 'reasonable, fair and just' procedure.

6. The right to free legal services is clearly an essential ingredient of 'reasonable, fair and just, procedure for a person accused of an offence and it is guaranteed under **Article 21 of the Constitution**.

This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty.

7. Similarly, in the civil side, **Order XXXIII, Rule 18 of the Code of Civil Procedure 1908** provides that the State and Central Governments may make supplementary provisions for providing free legal services to persons to sue as an indigent person.

8. The **Legal Services Authorities Act, 1987** made drastic changes in the field of legal services. It is an Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society.

It ensures that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. It organizes **Lok Adalats** to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Point out the principal functions of Court.*
2. *a) What are the matters which arise for consideration and determination before a Court of Law.*

   b) What are the secondary functions of Courts.
3. *Write short notes on: (a) Secondary functions of Court (b) Specific enforcement (c) Sanctional enforcement*

41. LEGAL SANCTION
(CIVIL AND CRIMINAL ETC.,)(CAPITAL PUNISHMENT)

(IMPORTANT)

SYNOPSIS:

A. ***Definition and Meaning***

B. ***Civil Sanctions***

C. ***Criminal Sanctions***

D. ***Ultimate Sanctions***

E. ***Intermediate Sanctions***

F. ***Capital Punishment (Death Penalty) - Retention and Abolition***

G. ***Reformative Punishments***

A. DEFINITION AND MEANING:

Sanction is the application of the physical force of the State for the enforcement of law.

The term 'sanction is wider than the term punishment because punishment is only a kind of sanction of criminal law. Besides punishment, there are civil sanctions like restitution, compensation, etc.

Sanction is different firm liability. Sanction is evil incurred by disobedience to the law whereas liability is the exposedness to the sanctions of the law.

Sanctions are divided into **four** types:

1. Civil sanctions
2. Criminal Sanctions
3. Ultimate sanctions
4. Intermediate sanctions

B. CIVIL SANCTIONS:

Civil sanctions are private sanctions and they are:

1. Damages -either liquidated or unliquidated, normal or special.
2. Costs which need to be reimbursed by the unsuccessful party to a litigation.
3. Restitution of property.
4. Specific performance of Contract.
5. Various types of Injunctions

C. CRIMINAL SANCTIONS:

They include fine, imprisonment (both simple and rigorous), forfeiture of property, death sentence, transportations for life, etc.

D. ULTIMATE SANCTIONS:

Any sanction which is not the imposition of another duty, but which is the liability to some other evil is called an Ultimate sanction. E.g.: bodily pain, imprisonment, etc.

E. INTERMEDIATE SANCTIONS:

When a person has broken a primary duty, law imposes another duty on the violator as a sanction and it is called an Intermediate sanction.

F. CAPITAL PUNISHMENT (DEATH PENALTY) - RETENTION AND ABOLITION:

The number of offences for which the penalty is death is steadily decreasing. At present, death penalty is given only for such offences like cold blooded murder, that too, rarest of rare cases and treason. In some countries, death penalty has been altogether abolished.

I. ARGUMENTS FAVOURING RETENTION OF DEATH PENALTY:

1. As death penalty is very frightening, it has a greater deterrent influence even upon hardened criminals.

2. As the dangerous or unworthy members of society are permanently eliminated by death, it is the most effective preventive punishment.

3. If death penalty is abolished, hardened criminals and incorrigible offenders have to be maintained unnecessarily at public cost.

II. ARGUMENTS FAVOURING ABOLITION OF DEATH PENALTY:

1. Death penalty is a principle of "an eye for an eye, tooth for a tooth". So, by nature, Jurisprudence should not depend upon such a principle.

2. Sometimes due to judicial errors, injustice may occur. If the accused is alive, injustice can be remedied. If the person is hanged, then errors become irredeemable.

3. Death penalty is a serious obstacle in the way of individualization and it is very arbitrary.

4. Even great reformers have condemned Death penalty. They are of the view that it is dangerous to the society, as it is like barbarism.

G. REFORMATIVE PUNISHMENTS:

1. IMPRISONMENT:

Under the Reformative theory, imprisonment in prison is congenial for the moral education of the criminals. Till the 18th century, all the prisoners were indiscriminately kept together. But afterwards, they were segregated in individual cells so that they could repent for their misdeeds in solitude. Moreover, they are made to work under strict supervision so that they are in some way useful to the society.

2. BORSTAL INSTITUTIONS:

Juvenile and adolescent offenders are given industrial training and the discipline and conduct in these institutions influences the juvenile offenders who are between the age of 16 to 21 to get reformed and not to become habitual offenders. Thus juvenile offenders are subject to reformation to make them law abiding citizens.

3. PROBATION:

Probation is a system of penology developed in America. According to this system, raw offenders are not punished but they are let off by entering into a bond

of good behaviour for 3 years. If the offender does not commit any offence during this period, then he is not punished. In case he commits any crime, then he is punished for the previous offence also. The prisoner is under the care and guidance of a Probation officer during the probation period.

4. PAROLE:

Here, the offender is released from prison or reformatory institution in which he has served a part of his sentance on the condition of maintaining good behaviour. The released prisoner is put under the supervision of a Parole officer who helps him in all possible ways.

OPEN AIR JAIL (OR) OPEN AIR INSTITUTIONS:

Open prisoners are rehabilitation devices recently developed so that the offenders could lead a normal life after release from prisons.

Open prisons provide work to inmates in forests, agricultural farms and construction sites instead of keeping them idle in the prison cells.

Open prisons are otherwise called open – air camps, open jail or parole camps. In open institutions, there is no physical precaution or security like walls, locks, bars and armed guards etc. It is mainly based on self discipline and responsibility towards the group in which he lives.

Based on certain assumptions that prisoners would respond well if they are trusted and the gap

between prison life and the free life outside prison should be minimized, the institution of open prison started developing in every country.

The national expenditure on prisoners can also be reduced considerably. Open prisons were universally accepted as an effective alternative to imprisonment.

Open prison institutions were established in Netherlands, France, Norway and Sweden, Hungary, Belgium, Australia, Thailand, Middle East countries and also in India.

In India, it was learnt that there was no use in dumping convicts in overcrowded cells and open air camps or open prisons are the best for rehabilitation of offenders in society. Harsh and unjust punishments only create more danger to the society.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *a) What are the legal sanctions in the administration of justice?*

   b) Appraise the value of retaining Capital punishment in the present law.

2. *What are the kinds of Sanctions? Do you consider the imposition of capital punishment necessary?*

42. OBLIGATION
(Rules, Types and Sources)

SYNOPSIS:

A. Definition

B. Rules of Obligations

C. Types of obligations

D. Sources of obligations

A. DEFINITION:

An obligation is defined as a proprietary right in personam or a duty which corresponds to such a right. The person entitled to the benefit of an obligation is called a **Creditor** and the person bound by it is called a **Debtor**.

Salmond defines obligation - as a proprietary ***right in personam*** or a duty which corresponds to such a right.

Paton describes it as a law which creates ***rights in personam***.

Savigny defines obligation as 'the control over another person, - over his single acts conceived from his free will and subjected to others will.

Obligation is a synonym for legal duty. It is restricted to **proprietary right in personam**.

Another synonym for obligation is **chose in action** or **thing in action.**

A chose in action may be described as a valuable personal right, e.g., a debt, a share or a claim for damages for civil wrong, etc.

B. RULES OF OBLIGATIONS:

1. An obligation is a proprietary right , or duty corresponding to such a right.
2. It is a right in personam.
3. The person enforcing the obligation is the creditor.
4. The person bound by the obligation is the debtor.
5. Obligation is a legal duty in terms of money .
6. If the obligation is time barred, then it is an imperfect obligation. Such obligation has only moral duty.
7. Only a perfect obligation is legally enforceable.
8. In a several solidary obligation, two or more persons have obligation to the same creditor under different transactions.
9. In a joint solidary obligation, two or more persons have obligation to the same creditor under the same transaction.
10. In a joint and several solidary obligation, two or more persons have obligation to the same creditor for the same thing by the same transaction.

11. If obligations are created by contracts, right in personam is created.

12. If obligations arise from torts right in rem is created.

13. Quasi contractual obligations are enforced on equitable principles.

C. TYPES OF OBLIGATIONS:

1. IMPERFECT OBLIGATION:

An imperfect obligation is a moral duty - a duty to pay a debt barred by limitation.

2. PERFECT OBLIGATION:

A perfect obligation pertains to the domain of justice and hence enforceable.

3. NORMAL OBLIGATION:

There are generally a creditor and debtor in a normal type of obligation.

4. JOINT OR COMMON OBLIGATION:

In some cases, there are more than one creditor and more than one debtor. Cases of an obligation owed by several creditors is either joint or common.

5. SOLIDARY OBLIGATION:

In the normal type of obligation, there is one creditor and one debtor. But sometimes, there may be two or more creditors entitled to the same obligation, or two or more debtors incurring the same liability.

Solidary obligation is an obligation in which two or more debtors owe the same thing to the same creditor.

For e.g., debts owed by a firm of partners, debts owed by a principal debtor and guaranteed by one or more sureties, the liability of two or more persons who jointly commit a tort, etc., In these cases, each debtor is liable for the whole amount due.

Solidary obligation is of **three** types:

1. A **several solidary obligation** is that where two or more persons owe the same thing to the same creditor under different transactions.

Here, each debtor is bound to the creditor by a distinct and independent bond, but the only connection between them is that in each case, the subject matter of the obligation is the same. Here, the performance by one of the debtors discharges all the other debtors also.

E.g.: A contracts a debt with X, a creditor. B and C are sureties for A's debt by two independent bonds. Here A, B and C owe the same thing to X, but their obligations arise from different transactions.

2. A **joint solidary obligation** is that where two or more persons are bound to the same creditor for the same thing by the same transaction.

Here the bond is single, but it binds several debtors to the same creditors. Here, even if one debtor is discharged, then all the debtors are discharged.

In several solidaty obligation, the performance by one debtor discharges others, but the bonds are independent of each other.

E.g.: A bond is executed together by a debtor and his two sureties for a debt to the creditor.

3. A **joint and several solidary obligation** is where two or more debtors are bound to the same creditor for the same thing by the same transaction, but law treats the obligation as several for certain legal purposes.

This obligation stands half way between the above two types namely several solidary obligation and joint solidary obligation. Thus, this obligation is a compromise between two competing obligations. Examples of joint and several obligations are the liabilities of those who jointly commit a tort or a breach of trust.

In Thompson Vs. the London County Council, (1899) 1 Q.B. 840:

The plaintiff's house was affected by the crack in its foundations due to negligent digging of land by the neighbour and also due to the negligence of a water company in flowing water to the foundation area.

Here, the Court held that the negligent act of digging by one person and the negligent act of flowing of water by another person are different acts quite independent of each other, but the damaged property is the same. So, the liability of the parties was solidary and not joint.

D. SOURCES OF OBLIGATIONS:

According to **Salmond,** obligations are divided into **three** major types namely:

i. Contractual obligations
ii. Delictal (tortious) obligations
iii. Quasi contractual obligations

I. CONTRACTUAL OBLIGATIONS:

Contractual obligations are created by contracts or agreements. These contracts create rights in personam between the parties, e.g., contract of sale and purchase, leases and guarantee. The rights created are proprietary in nature. It may sometimes be non-proprietary. E.g.: a promise of marriage, promise of maintenance, etc.

II. DELICTAL (TORTIOUS) OBLIGATIONS:

Delictal obligations arise from torts. **Salmond** defines a tort as a civil wrong for which the remedy is an action for damages and which is not solely the breach of a contract or the breach of a trust or other mere equitable obligation.The obligation arises through a claim for compensation for civil wrongs.

III. QUASI CONTRACTUAL OBLIGATIONS:

Quasi contractual obligations are enforced on equitable principles. There are certain obligations which are not contractual, but law treats as if they have legal obligation based on equity and justice.

Salmond says, it is a fictitious extension of the sphere of contract to cover obligations which do not fall within it.

Blackstone terms as implied contracts based on reason and justice.

Sometimes a person may receive a benefit to which the law regards another person as better entitled. The law requires that the first person should transfer the benefits to such better entitled person, even in the absence of any contract between the parties. Such relationships are termed 'Quasi Contract'. (This contract is based on the equitable principle that no one can enrich himself unjustly at the expense of another)

In English law, these contracts are called **'Constructive contracts'** and **'certain relations resembling contract'**. So a quasi contract is not a contract at all. A contract should be entered intentionally. But a quasi contract is created by law and equity.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define obligation and explain the classes of obligations.*
2. *Define obligation and discuss the different kinds of obligations with illustrations.*
3. *Write short notes on: (a) Solidary obligation (b) Obligations according to sources (c) Obligations arising from torts (d) Contractual Obligations. (e) Rules of Obligations.*

43. LAW OF PROCEDURE

(EVIDENCE AND PROOF)(VALUATION OF EVIDENCE)(PROCEDURAL AND SUBSTANTIVE LAW) (KINDS OF EVIDENCE)(PRESUMPTIVE PROOF)

SYNOPSIS:

A. Definition

B. Procedural and Substantive Law

C. Evidence and Proof

D. Kinds of Evidence

E. Presumptions or Presumptive Proof

A. DEFINITION:

Salmond defines the law of procedure as the branch of the law which governs the process of litigation. It includes all civil and criminal proceeding and also the rules governing the institution of proceedings.

'Procedure' is a method by which a legal right is enforced. Substantive law defines the right of a person and by means of the Court proceedings, it gives remedy to the person.

B. PROCEDURAL AND SUBSTANTIVE LAW:

There are difference between Procedural and substantive laws which are as follows:

1. Procedural law provides rules for the law of litigation i.e., civil and criminal proceedings whereas substantive law is law which concerns with the purposes and subject matter of litigation.

2. Procedural law deals with the means of administration of Justice, while substantive law deals with the ends of administration of justice.

3. Procedural law regulates the conduct and relations of Court and litigant in respect of the litigation, but the substantive law determines the conduct and relations of the parties regarding the matter in litigation.

4. Procedural law regulates the affairs inside the Courts, while the substantive law relates to matter outside the Courts.

Exceptions:

The substantive parts of criminal law deal with crimes and punishments also. In Civil Law rules, the measure of damages and its recovery are remedial rights and hence they are also substantive law, though, in literal sense, they are only procedural laws.

Salmond cites **three** cases of rules of procedure which are in fact rules of substantive law, though, in literal sense, they are only procedural laws.

1. A contract which can be proved only by writing is a rule of substantive law.

2. All conclusive presumptions are substantive law.

3. The limitation of actions is substantive law.

C. EVIDENCE AND PROOF:

I. EVIDENCE:

Salmond defines evidence as any fact which possesses probative force. It means one fact is evidence of another fact by reasonable belief and link.

Taylor defines evidence as all the legal means, which tend to prove or disprove any fact by judicial investigation.

Evidence means the facts, testimony and documents which may be legally admissible in order to prove or disprove a fact under inquiry.

Section 3 of the Indian Evidence Act defines evidence. Evidence means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of facts under inquiry and all documents produced for the inspection of the Court.

Valuation of evidence:

There are two parts in the law of evidence. They are:

(i) Rules for measurement/determination of the probative force/value of evidence. This is called **substantive evidence**.

Here, the probative force of evidence decides the effect of evidence when produced. The rules concern

with the all types of evidence both judicial and extra judicial.

In judicial proceedings, the **accurate measurement** of the evidential value of facts is a condition for the discovery of truth. In every judicial procedure, the rules for the estimation of probative force of evidence are rigid and inflexible to exclude judicial discretion.

The rules for the estimation of probative force of evidence are divided into **five** types. They are:

1. Conclusive proof
2. Conditional or rebuttable presumption
3. Insufficient evidence
4. Exclusive evidence
5. No evidence

1. Conclusive proof:

When the Act declares one fact to be the conclusive proof of another, the Court shall take this as conclusive proof and shall not take evidence to disprove it. Here, the judges have no discretion and they have to accept as if such presumption is proved. The best example is Sec. 82 of IPC "Nothing is an offence which is done by a child under 7 years of age".

In this case, even though the child has committed an offence, the Court cannot punish it. It is a direction of law and it cannot be rebutted. So it is an irrebuttable presumption of law. So in conclusive proof, the probative force of the fact is so strong that it does not admit any contradiction or rebuttable.

For e.g, a person who would establish case must maintain it and hence the burden of proof is on that person only. This is a case of conclusive presumption which cannot be contributed.

Similarly in the principle of res judicata and earlier judgment in a particular subject matter is a conclusive evidence as between the parties.

2. Conditional or rebuttable presumption:

In certain cases, if the Court shall presume a fact, then it shall regard such fact as proved unless and until it is disproved. Here the presumption of the judges can be disproved by the other party by proving contradicting evidence.

For e.g., in all criminal trials, the presumption is that the accused is always innocent. This is presumption directed by law and hence termed presumption of law. But the presumption can be rebutted by the prosecution side by adducing evidence against the accused. So, it is termed as rebuttable presumption.

Similarly, if a person is not heard of seven years, then he is presumed to be dead. But this is rebuttable. Similarly, negotiable instrument is presumed to have been given for value, but rebuttable.

3. Insufficient evidence:

If the probative force of a fact falls short of the minimum requirement for proof, then such evidence is considered as insufficient evidence. The Courts are not permitted to act upon it.

For e.g., in a charge of treason against an accused, the evidence of one witness is insufficient.

4. Exclusive evidence:

Law declares certain facts are treated as exclusive evidence and so no other evidence is admissible in such circumstances.

For e.g., the execution of a document which requires attestation can be proved only by the testimony of an attesting witness and by no others.

Similarly, a written contract can be proved only by the production of the writing itself. The contract of guarantee can be proved only by writing and not orally.

5. No evidence:

Rules declare that certain facts are not evidence, since they do not have any probative force. Such facts cannot be produced before Court as evidence.

For example, hearsay evidence is no evidence, bad character of an accused person is no evidence.

Similarly, a party to a suit possessing any pecuniary interest in it cannot be a competent witness in such case.

(ii) Rules determining the modes and conditions of the production of evidence. This is called **procedural evidence**.

Here, the manner in which the evidence is to be produced. The rules concern with judicial evidence alone.

II. PROOF:

A fact is said to be proved when the Court is satisfied as to its truth. The evidence by which that result is produced is called the proof.

Proof is the evidence. Proof is the establishment of facts in issue by proper legal means to the satisfaction of the Court. Evidence is the only medium of proof.

D. KINDS OF EVIDENCE:

The following are the various kinds of evidence.

1. PRIMARY AND SECONDARY EVIDENCE:

Primary evidence is immediate of a principal fact. The law requires that evidence should be given in its

original form. Under the Indian Evidence Act, primary evidence means in the case of oral evidence, the evidence of a person who has seen or felt the particular fact and in the case of documentary evidence, the production of the document itself.

Secondary evidence means substituted evidence and it is inferior to primary evidence. It is permissible only if the primary evidence cannot be produced. Secondary evidence means and includes certified copies, copies made from the original by mechanical process, copies compared with the original, counter of documents and oral accounts of the contents of a document given by some person who has himself seen it.

2. Real and Personal Evidence:

Real evidence is directly addressed to the senses of the Court. It is the evidence through material object before the Court for inspection. For example, discovery of an object in furtherance of confession.

Personal evidence is the testimony of witnesses. Testimony may be either oral or written.

3. Original and Hearsay Evidence:

Original evidence is evidence which a witness reports himself to have seen or heard with his own senses.

Hearsay evidence is an evidence of fact not actually perceived by a witness with his own senses,

but proved by him to have been stated by another person. A witness merely reports not what he himself saw or heard, but which he has learnt through the medium of a third person. The law does not recognise hearsay evidence.

4. Direct and Circumstantial Evidence:

Direct evidence is the testimony of a witness relating to the precise point in issue. It is an evidence of a fact perceived by a witness with his own senses. Direct evidence is also known as positive evidence.

Circumstantial evidence is that evidence which relates to a series of other facts than the fact in issue but they are closely connected with that fact so as to lead to definite conclusion. Circumstantial evidence is also known as presumptive evidence.

5. Judicial Evidence:

Judicial evidence consists of the testimony given by witnesses in the Court.

6. Extra Judicial Evidence:

Extra Judicial evidence consists of facts not directly proved in Court, but which serves a link between judicial evidence and the fact requiring proof.

E. PRESUMPTIONS OR PRESUMPTIVE PROOF:

After the evidence is received by the Court, there remains the problem of evaluating it and determining

its weightage. The probative value of evidence is determined by legal rules.

Assessing the value of evidence is by means of legal presumptions.

Legal presumption is of **two** types:

1. Rebutable presumption ("Shall presume")
2. Irrebutable presumption ("Conclusive proof")

1. REBUTTABLE PRESUMPTION OF LAW OR 'SHALL PRESUME':

Section 4 of Indian Evidence Act says, 'whenever it is directed by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved'. The judges have no discretion here. The Act itself directs that the Court should presume a fact. The instances of such fact are given by the Act itself.

But the presumption of the judges can be disproved by the other party. In all criminal trials, the presumption is that the accused is always innocent. This is a presumption directed by law and hence termed presumption of law.

But the presumption can be rebutted by the prosecution side, by adducing evidence that the accused has committed the offence. So, it is termed as rebuttable presumption.

2. IRREBUTTABLE PRESUMPTION OF LAW OR CONCLUSIVE PROOF:

When the Act declares one fact to be the conclusive proof of another, the Court shall take this as conclusive proof and shall not take evidence to disprove it. Here, the judges have no discreti.on and they have to accept as if such presumption is proved.

The best example is Sec. 82 of IPC 'nothing is an offence which is done by a child under 7 years of age'. In this case, even though the child has committed an offence, the Court cannot punish it. It is the direction of law and it cannot be rebutted. So it is an Irrebuttable presumption of law.

In the same way, the Court presumes a contract as void ab initio (from the beginning) if it is entered into with a minor.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain Procedural and substantive law and distinguish between the two.*
2. *Explain the difference between Evidence and Proof.*
3. *What are the different types of Evidence?*
4. *Write short notes on: (a) Procedural and substantive law (b) Primary and Secondary Evidence (c) Real and Personal Evidence (d) Original and Hearsay Evidence (e) Presumptions or Presumptive proof*

44. COMPARATIVE LAW-PURPOSES & IMPORTANCE

SYNOPSIS

A. Introduction

B. Purposes of Comparative law

C. Importance of Comparative Law

A. INTRODUCTION

Comparative law is the study of differences and similarities between the law of different countries.

It is the study of the different legal systems in existence in the world, including the common law, the civil law, socialist law and the family laws like the Islamic law, Hindu law, and Chinese law.

It includes the description and analysis of foreign legal systems.

The importance of comparative law has increased enormously due to economic globalisation.

The birth of modern comparative law is generally attributed to Europe in the eighteenth century, though, prior to that, it was practiced.

B. PURPOSES OF COMPARATIVE LAW

1. Comparative law is an academic study of separate legal systems, its constitutive elements; how they resemble and differ in the different legal systems, etc.,

2. Several disciplines have developed as separate branches of comparative law, including comparative constitutional law, comparative administrative law, comparative civil law, comparative commercial law and comparative criminal law.

3. Studies of micro-or macro-comparative legal analysis, like detailed comparisons of two countries, or broad-ranging studies of several countries are made.

4. Comparative civil law studies show how the law of private relations is organised, interpreted and used in different systems or countries.

The principal purposes of comparative law are:

a. To attain a deeper knowledge of the legal systems

b. To perfect the legal systems in effect

c. To contribute to a unification of legal systems, of a smaller or larger scale.

C. IMPORTANCE OF COMPARATIVE LAW

1. Comparative law is a very important discipline in communication between legal systems.

2. It provides the basis for the production of bilingual dictionaries to make legal communication across borders successful.

3. It also helps mutual understanding.

4. It provides a platform for intellectual exchange in terms of law and it cultivates a culture of understanding in a diverse world.

5. It helps in widening the knowledge of law reformers and legislators around the world.

6. It helps in international relations in shaping foreign policies.